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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

ORIGINAL NO. 2

COMMONWEALTH OF VIRGINIA, Plaintiff,

vs.) In Equity.

STATE OF WEST VIRGINIA, Defendant.

DEFENDANT'S BRIEF

PARTS I., II. AND III.

WILLIAM G. CONLEY,
Attorney General of West Virginia.

JOHN C. SPOONER,
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W. MOLLOHAN,
GEORGE W. MCCLINTIC,
W. G. MATHEWS,
WM. M. O. DAWSON,
Of Counsel for Defendant.

LOVETT PRINTING COMPANY, INC.
CHARLESTON, W. VA.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

ORIGINAL NO. 3.

COMMONWEALTH OF VIRGINIA, Plaintiff,

vs.) In Equity.

STATE OF WEST VIRGINIA, Defendant.

DEFENDANT'S BRIEF

PARTS I., II. AND III.

WILLIAM G. CONLEY,
Attorney General of West Virginia.

JOHN C. SPOONER,
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DEFENDANT'S BRIEF

PART I.

RGUMENT OF CASE ON THE BILL AND ANSWER AND EXHIBITS.

INTRODUCTORY STATEMENT.

Complainant's bill was filed at the October term, 1906, to which fendant interposed demurrer and amended demurrer, which, after gument, in March, 1907, were overruled in the opinion of this urt pronounced May 27, 1907 (206 U. S. 290).

The briefs and argument of counsel on the demurrer are contained West Virginia Compilation, Vol. I. (See last paragraph of this tement.)

Defendant filed her answer and its exhibits in October, 1907.

May 4, 1908, the cause, by a decree, was referred to a Special Master

with directions (209 U. S. 514), which directions were modified, June 1, 1908, by substituting in paragraph 2 of the decree of reference the words "assessed valuation" for the word "value."

There is contained in Vol. 2 of West Virginia Compilation, at the pages indicated, the following:

Form of decree proposed by each party, referring cause to a Master, plaintiff's at p. 35, defendant's p. 41; the motion of defendant to modify the decree of reference, p. 325; the order modifying said decree, p. 371; the names recommended by each party as fit persons to be appointed Master, by plaintiff at p. 61, by defendant at p. 57; the order appointing Mr. Charles E. Littlefield Special Master, p. 375. The volume also contains the briefs and arguments of counsel on the motion to refer the cause to a Master and on the motion to modify the decree of reference.

Beginning on November 16, 1908, and ending on July 2, 1909, sessions were held by the Special Master at Richmond, Va., to take evidence. Thereafter the Special Master held sessions in the city of New York, to hear arguments of counsel, the last whereof was held on January 1, 1910.

March 17, 1910, the Special Master filed his report.

In April, 1910, the parties filed printed exceptions to the Master's report.

The printed Record consists of two volumes; the Record proper, referred to herein as "R., p. ___"; and the Appendix to the record, referred to herein as "App., p. ___." The Appendix contains such statutes and ordinances and extracts therefrom, and selections from constitutions of Virginia and West Virginia, as were deemed most material to the questions in the cause, compiled by the parties under direction of the Special Master.

The Record consists of Part I. and Part II. The former contains the Bill and its exhibits; defendant's demurrer and amended demurrer; opinion of the Court overruling demurrer (206 U. S. 290); defendant's answer and its exhibits; decree referring cause to the Master; motion to modify decree of reference; and the orders modifying decree, and appointing the Special Master.

Part II. contains the proceedings and evidence taken before the

Special Master, arranged under the seven paragraphs of the decree of reference; followed by the evidence of general application to the cause. Under each paragraph is printed the exhibits and other evidence germane to the subject of the paragraph.

But not all the exhibits, documents and other evidence adduced is printed in the Record. In order to keep the Record as small as might be, under direction of the Master much was omitted therefrom. None of the original principal exhibits of either party are printed, except under Paragraph VII. After the oral evidence of the expert accountants of each party was given, by direction of the Master, these accountants prepared "Joint Exhibits," from which all items were omitted about which there was no disagreement as to amount; and in which the items and details thereof about which there were disagreement were stated. Some other exhibits were also omitted.

So, the oral evidence of the expert accountants printed in the Record was given under the original exhibits and before the "Joint Exhibits" were prepared. All matters of mere routine were also omitted from the Record; but all the exhibits, evidence, etc., introduced before the Master at the hearings specified are part of the record of the cause, and were returned by the Master with his report.

Some evidence was taken by the Master after the Record was printed, and designated as " Supplemental Exhibits" 1 to 11.

Besides the foregoing, there have been used in the cause two books, gotten out by the Attorneys General of West Virginia, referred to above as West Virginia Compilation, Vol. I. and Vol. II., and referred to herein as " W. Va. Comp., vol. ---, p.----." Copies of these books have been filed in the clerk's office of the Court.

Historical Statement Showing Formation of West Virginia and Her Assumption of a Just Proportion of the Public Debt.

On November 15, 1860, Governor John Letcher issued a proclamation convoking the General Assembly of Virginia in extra session. In obedience to this proclamation, the general assembly convened in the capitol at Richmond at the time designated therein, and on January 14, 1861, passed an act providing "for electing members of

a convention and to convene the same." The delegates to this convention were to be elected on the 4th of February, 1861, and to assemble at Richmond on the 14th of the same month.

The convention assembled at Richmond at the time appointed, composed of 152 delegates, of whom 47 were from counties now included in West Virginia, and on April 17, 1861, the following ordinance was adopted by said convention:

"AN ORDINANCE TO REPEAL THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA BY THE STATE OF VIRGINIA, AND TO RESUME ALL THE RIGHTS AND POWERS GRANTED UNDER SAID CONSTITUTION.

"The people of Virginia, in their ratification of the Constitution of the United States of America, adopted by them in Convention on the twenty-fifth day of June, in the year of our Lord, one thousand seven hundred and eighty-eight, having declared that the powers granted under the said Constitution were derived from the people of the United States, and might be resumed whensoever the same should be perverted to their injury and oppression, and the Federal Government having perverted said powers, not only to the injury of the people of Virginia, but to the oppression of the Southern Slaveholding States.

"*Now, therefore, we, the people of Virginia, do declare and ordain,* That the ordinance adopted by the people of this State in Convention, on the twenty-fifth day of June, in the year of our Lord, one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified; and all acts of the General Assembly of this State ratifying or adopting amendments to said Constitution, are hereby repealed and abrogated; that the union between the State of Virginia and the other States under the Constitution aforesaid is hereby dissolved, and that the State of Virginia is in full possession and exercise of all the rights of sovereignty which belong and appertain to a free and independent State.

"*And they do further declare,* That said Constitution

of the United States of America is no longer binding on any of the citizens of this State.

"This Ordinance shall take effect and be an act of this day, when ratified by a majority of the votes of the people of this State, cast at a poll to be taken thereon, on the fourth Thursday in May next, in pursuance of a schedule hereinafter to be enacted."

The Ordinance of Secession was accompanied by a Schedule providing, among other things, for a vote of the people on the question of the ratification of the ordinance by the people of Virginia, to be taken on the fourth Thursday in May, 1861. The ninth section of this ordinance provided as follows:

"The election for members of Congress for this State to the House of Representatives of the Congress of the United States, required by law to be held on the fourth Thursday in May next, is hereby suspended and prohibited until otherwise ordained by this Convention."

On April 18, 1861, said Convention adopted the following resolution:

"*Resolved*, That the Governor of this Commonwealth be requested to communicate immediately to the President of the Confederate States, the fact that this Convention, on yesterday, adopted an Ordinance resuming the powers delegated by Virginia to the Federal Government, and to express to the said President the earnest desire of Virginia to enter into an alliance, offensive and defensive, with the said Confederate States."

Pending the question of the ratification of the Ordinance of Secession by a vote of the people of Virginia, the State entered into the following temporary convention with the Confederate States of America:

"1st. Until the union of said Commonwealth with said Confederacy shall be perfected, and said Commonwealth shall become a member of said Confederacy according to the Constitutions of both powers, the whole military force and military operations, offensive and defensive, of said Commonwealth, in the impending conflict with the United States, shall be under the chief control and direction of the President of said Confederate States, upon the same principles, basis and footing

as if said Commonwealth were now, and during the interval, a member of said Confederacy.

"2nd. The Commonwealth of Virginia will, after the consummation of the union contemplated in this convention, and her adoption of the Constitution for a permanent Government of said Confederate States, and she shall become a member of said Confederacy, under said permanent constitution, if the same occur, turn over to said Confederate States all the public property, naval stores and munitions of war, etc., she may then be in possession of, acquired from the United States, on the same terms and in like manner as the other States of said Confederacy have done in like cases.

"3rd. Whatever expenditures of money, if any, said Commonwealth of Virginia shall make before the union under the Provisional Government, as above contemplated, shall be consummated, shall be met and provided for by said Confederate States.

"This Convention, entered into and agreed to, in the city of Richmond, Virginia, on the twenty-fourth day of April, eighteen hundred and sixty-one, by Alexander H. Stephens, the duly authorized commissioner to act in the matter of the said Confederate States, and John Tyler, William Ballard Preston, Samuel McD. Moore, James P. Holcombe, James C. Bruce and Lewis E. Harvie, parties duly authorized to act in like manner for said Commonwealth of Virginia—the whole subject to the approval and ratification of the proper authorities of both governments respectively.

"*In testimony whereof,* the parties aforesaid have hereto set their hands and seals, the day and year aforesaid, and at the place aforesaid, in duplicate originals.

"JOHN TYLER, (SEAL)
"WILLIAM BALLARD PRESTON, (SEAL)
"SAMUEL MCD. MOORE, (SEAL)
"JAMES P. HOLCOMBE, (SEAL)
"JAMES C. BRUCE, (SEAL)
"LEWIS E. HARVIE, (SEAL)
"Committee of the Convention.

"ALEXANDER H. STEPHENS, (SEAL)
"Commissioner for Confederate States."

On the day upon which the Convention adopted the Ordinance of Secession, it took steps to enable the government of Virginia to possess itself of the property of the Federal Government within its territorial jurisdiction; and Virginia accordingly reduced into her own possession the Norfolk and Gosport Navy Yards, with vessels, steam engines, machinery, tools, supplies and other property, valued at $2,497,130.92, and the old and new custom houses at Norfolk, valued at $207,000.00.

On the same day (April 17) the Commonwealth of Virginia, through said Convention, provided for a State Military force. This was done by the adoption of "An Ordinance to call the volunteers into the service of the State and for other purposes." On the 19th of April, the office of Major-General of the Military and Naval forces of the State was created. Three days later Governor Letcher nominated Robert E. Lee for this office, which was promptly confirmed by the Convention. April 27th, an Ordinance providing for Enlistment in the Provisional Army was adopted. It provided that all free, able-bodied men, between the ages of eighteen and forty-five, might enlist, and the enlistment should be binding on minors, provided they be allowed four days to reconsider and retract their enlistment.

On the 29th of April, five Congressmen were elected to represent Virginia in the Provisional Congress of the Confederate States, about to assemble at Montgomery, Alabama. These were the Hon. R. M. T. Hunter, of Essex county; William C. Rives, of Albemarle county; the Hon. John W. Brockenbrough, of Rockbridge county; Walter R. Staples, of Montgomery county, and Judge Gideon D. Camden, of Harrison county.

By another Ordinance, adopted April 30th, the term of service of all volunteers called into service under the Ordinance of the 17th of April, 1861, was twelve months, unless sooner discharged.

On May 1, 1861, the Convention adopted an Ordinance absolving all citizens of Virginia from their allegiance to the United States.

On May 7, 1861, the representatives of Virginia in the Confederate Congress took their seats in that body, except said Camden, and a Resolution adopted by the Congress of the Provisional Government, ratified the terms of alliance entered into on the 24th of the preced-

ing April, by and between Alexander H. Stephens, the Confederate Commissioner, and the Commissioners of Virginia, and the old Commonwealth was thus formally admitted into the Confederate States of America, May 7th, 1861.

> "*A Brief Summary.*—The Convention having adopted an Ordinance of Secession; forbidden the election in the State of representatives to the Federal Congress; effected an Alliance, offensive and defensive, between Virginia and the Confederate States; adopted the Constitution of the Provisional Government of said States; elected five members of the Confederate States Congress, four of whom hastened to take their seats; released all officers from the oaths they had taken to support the Constitution of the United States, and absolved all the people of Virginia from their allegiance to the United States; captured the property of the National Government at Harper's Ferry; took possession of the Norfolk and Gosport Navy Yards, with the property connected therewith; occupied the custom houses at Norfolk and Richmond; and made arrangements by which the State was formally admitted a member of the Confederate States,—the whole done before the time arrived for the people to vote for the ratification or rejection of the Ordinance of Secession,—the Convention adjourned until June 12th ensuing."
>
> See "*How West Virginia Was Made,*" by Lewis,, pp. 8-23.

Pending the vote upon the question of ratifying the Ordinance of Secession, the loyal citizens left within the counties now constituting West Virginia asserted an earnest and patriotic endeaver to avoid the calamity incident to the adoption of this ordinance. After publication by the authorities at Richmond of its adoption, the citizens of the old state living within the present boundaries of West Virginia, instituted a movement to restore the practical governmental relations of Virginia to the United States.

The first convention called by the people of Northwestern Virginia, known as the May Convention, adjourned on the 15th day of May, 1861, after having provided for the meeting of a second convention in the event that the Ordinance of Secession should be ratified by the

people on the 23rd day of May ensuing. This was done by means of a resolution, reported by the Committee on Federal Relations, adopted by the convention, as follows:

> "*Resolved*, That, in the event of the Ordinance of Secession being ratified by a vote, we recommend to the people of the Counties here represented, and all others disposed to co-operate with us, to appoint, on the 4th day of June, 1861, delegates to a General Convention, to meet on the 11th of that month, at such place as may be designated by the Committee hereinafter provided, to devise such measures and take such action as the safety and welfare of the people they represent may demand, each county to appoint a number of Representatives to said Convention equal to double the number to which it will be entitled in the next House of Delegates; and the Senators and Delegates to be elected on the 23rd inst., by the counties referred to, to the next General Assembly of Virginia, and who concur in the views of this Convention, to be entitled to seats in the Convention as members thereof."

The second convention of the people of Northwestern Virginia assembled on June 11, 1861. It adopted an ordinance for the reorganization of the State government of Virginia. This ordinance provided for the appointment of a governor and a lieutenant governor, and also for other State officers of Virginia, and declared that the members elected to the General Assembly of Virginia should meet in Wheeling and constitute the legislative department of the government; and all other necessary steps were taken to restore the government of Virginia to her proper place in the Union; in fact, the government of Virginia was duly restored in this convention. After transacting all the business necessary to this restoration, the convention adjourned to meet on the first Tuesday in August, 1861, in the city of Wheeling. On Tuesday, August 6, 1861, this convention, which adjourned on the 25th of June of the same year, re-assembled pursuant to its adjournment. At its second session this convention provided by ordinance for the formation of a New State out of the territory of Virginia now constituting West Virginia, and for the call of a convention, to which delegates should be elected, for the

formation of a constitution for the new State. This election was duly held, and the delegates elected to such convention met, and framed a constitution. The convention assembled on the 26th of November, 1861, and, having finished its work, adjourned on February 18, 1862. A schedule was attached to this proposed constitution, providing for an election to take the sense of the people on the question of ratification. The election was held on April 3, and resulted in its ratification by the people. On May 13, 1862, the General Assembly of Virginia passed an act giving the assent of Virginia to the formation and erection of the proposed new State; and on April 20, 1863, a proclamation was made by the President of the United States, reciting the act of Congress approved on the 31st day of December, 1862, by which the State of West Virginia was declared to be one of the United States of America, and was admitted into the Union on an equal footing with the original States in all respects whatsoever, upon the condition that certain changes should be duly made in the proposed constitution of that State; and then reciting that proof of a compliance with that condition had been submitted to him, he therefore declared in pursuance of the act of Congress, that the said act would take effect and be in force from and after sixty days from April 20, 1863; and accordingly on that day, June 20, 1863, West Virginia became one of the United States.

See *"How West Virginia Was Made,"* pages 78 *et seq.*, 317 *et seq.*

A condensed history of the formation of West Virginia appears in the case of *Virginia* v. *West Virginia*, 78 U. S. 39 (20 L. Ed. 67). There can be no question as to the validity of the acts of the Restored Government of Virginia which resulted in the formation of the State of West Virginia, as this is settled by the case just cited, and also because the new State was recognized as one of the States of the Union by all branches of the general government. The formation of the State of West Virginia was the result of the acts of the loyal government of Virginia—a government in harmony with the general government, and one performing all the acts of a government of a State in all its practical relations with the Federal government. The ninth section of the ordinance providing for the

formation of the new State, contains the following as to the assumption by West Virginia of a part of the public debt of Virginia:

> "Said new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State within the same period."
>
> Appendix to R., p. 122.

The Constitution of the new State, adopted in 1862, by a vote of the people, with reference to the said debt, provides as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."
>
> Appendix to R., p. 125.

Shortly after the close of the late Civil War, Virginia brought suit against West Virginia to establish jurisdiction over the counties of Jefferson and Berkeley, claimed by the defendant as a part of her territory. This suit was not decided until March 6, 1871, when the demurrer filed to the bill was sustained and the bill dismissed.

Virginia v. *West Virginia*, 78 U. S. 39 (20 L. Ed. 67).

Therefore, it was not known until the decision of this case whether the counties of Jefferson and Berkeley were a part of Virginia or West Virginia; and hence no settlement could be made between the two States with reference to the public debt, on the basis of the ordinance of Virginia, above quoted, providing the method by which the settlement should be effected, until after this case was decided.

Virginia Sought No Adjustment with West Virginia of Any Part of the Public Debt as Alleged in Her Bill.

With reference to the efforts at settlement between the two states touching the public debt, the bill makes this averment:

> "After the year 1865, and prior to the year 1872, attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settling of any kind was ever had between the two States in regard to this debt."
>
> Record, p. 10.

The answer of the defendant to this paragraph of the bill appears in the record at pages 149-154. The facts in relation to this matter are as follows:

The first governor of West Virginia, the Hon. Arthur I. Boreman, in his first message to the first legislature of that state, in discussing the financial condition and prospects of the new state, said:

> "The constitution provides that this state shall assume an equitable proportion of the debt of Virginia, prior to the first day of January, 1861, but no settlement can be made at present, and when it is made our 'equitable proportion' cannot be much."

In his message, dated January 16, 1866, to the legislature of that year, Governor Boreman, after quoting section 8 of article 8 of the constitution of West Virginia, says that the execution of this provision of the constitution had theretofore been impracticable on account of the existence of the war, but now that the war is over and peace is restored, he recommended the appointment of commissioners on behalf of the state to meet a like commission from Virginia.

Prior to December, 1866, Virginia instituted a suit in equity against the State of West Virginia in this Honorable Court for a decision of the question whether or not the counties of Berkeley and

Jefferson constituted a part of the State of West Virginia. This cause was not determined until the 6th day of March, 1871, on which day it was decided in favor of West Virginia. During pendency of this suit no adjustment of West Virginia's liability, as provided in the ordinance, could be made, because until the boundaries of West Virginia were definitely determined it could not possibly be known what (1) amount of money was spent within the boundaries as state expenditures, (2) what her just proportion of the expenses of the state government was, nor (3) the amount paid into the state treasury from her counties, as provided by the ordinance.

In his message to the legislature of 1867, Governor Boreman refers to his recommendation of the appointment of commissioners, made in last message, to meet commissioners from the State of Virginia, and states that it had not been done because the authorities of Virginia had made no provision for such settlement. He states that he was informed that the Honorable Alexander H. H. Stuart of Virginia, together with two others, had been appointed under a resolution adopted by the general assembly of Virginia; first, for the purpose of securing a reunion of the two states, or secondly, for the purpose of adjusting the public debt and for a fair division of the public property. On February 28 of the same year, the legislature of West Virginia by resolution declared that the people of that state were unalterably opposed to a reunion with the people of Virginia, but expressed the willingness of West Virginia to effect a prompt and equitable settlement between the two states, and directed the Governor as soon as the said suit in the Supreme Court of the United States relating to the counties of Berkeley and Jefferson had been disposed of, to appoint three commissioners on the part of West Virginia to treat with commissioners of Virginia upon the matter of adjusting the public debt as provided in the ordinance of 1861 and the constitution of West Virginia (W. Va. Compilation, vol. 1, pp. 444-6).

In January, 1868, the governor of West Virginia informed the legislature in his annual message, that the

> "Commissioners to treat with Virginia in regard to the public debt of that state, have not yet been appointed under the resolutions of that subject adopted by the

> legislature, February 28, 1867. The resolutions prescribe that the suit brought by Virginia in the Supreme Court of the United States, to recover jurisdiction over the counties of Berkeley and Jefferson, shall be finally disposed of before such appointment shall be made, which event has not yet transpired; and, if it had, there might still be a question whether such settlement should take place in the present condition of affairs in Virginia."

The "present condition of affairs in Virginia" referred to was doubtless that arising out of the anomalous situation caused by the refusal of Congress to admit representatives from Virginia, from December, 1865, until the state was re-admitted into the Union in 1870. Congress, it appears, refused to recognize as valid the legislature that assembled under the Alexandria constitution of Virginia. Later, the state was placed under military government; a new constitution was adopted in 1868, ratified by the people in July, 1869, and Virginia re-admitted into the Union January 26, 1870. No negotiations could properly or safely have been carried on with Virginia during this period of "reconstruction," even if the suit to recover Berkeley and Jefferson counties had not been pending.

Again, in his message in 1869 to the legislature of West Virginia, the Governor stated that commissioners had not been appointed by him up to that time, owing to the fact that the suit between the states was still pending. Virginia having, by an act approved February 18, 1870, provided for the appointment of three commissioners to treat with the authorities of West Virginia, the Governor of West Virginia, by communication dated February 24, 1870, advised the legislature of West Virginia of the passage of that act; and thereupon the legislature of West Virginia, March 1, 1870, appointed a joint committee of its two houses to confer with the Virginia commissioners and report to the legislature, providing, however, that such appointment of commissioners should not in any manner prejudice the rights of West Virginia involved in the suit then still pending in this Court respecting the counties of Berkeley and Jefferson. (W. Va. Comp., vol. 1, pp. 446-7.)

On March 3, 1870, the Governor of West Virginia was authorized

by the legislature by joint resolution to appoint three resident citizens of the state, to treat with the authorities of Virginia upon the subject of the public debt of that state, but it was provided that nothing in that action was to be construed as impairing the jurisdiction of West Virginia over the counties of Berkeley and Jefferson. (W. Va. Comp., vol. 1, pp. 447-8.) As the resolution was passed on the last day of the session, and as there was omission to make appropriation of money to carry out its provisions, the Governor of West Virginia, in his message of 1871, stated that no appointment had been made owing to the lack of funds to pay the compensation and expenses of such commission.

Pending the efforts thus being made on the part of West Virginia, the general assembly of Virginia, through the Governor of that state, tendered to West Virginia a proposition for an arbitration of the question relating to the debt, the arbitrators not to be citizens of either state, each state to appoint two, and an umpire to be chosen by the arbitrators if deemed necessary. This proposal was submitted to the legislature of West Virginia on February 17, 1871; but on the 15th, two days prior to the communication of this action of Virginia, the legislature of West Virginia had passed a joint resolution, authorizing the Governor to appoint three disinterested citizens of the state to treat with the authorities of Virginia upon the subject of the adjustment of the public debt of that state existing prior to January 1, 1861, to report on various matters relating to the creation of the debt, upon the investments held by the state of Virginia, and, providing, among other things, compensation for the commissioners and for the employment of an accountant or clerk. (W. Va. Comp., vol 1, pp. 448-9.)

The proposal of Virginia relating to arbitration was referred by the legislature of West Virginia to a joint special committee of the two houses, which committee reported a preamble and joint resolution, rejecting the tender of arbitration because the adjustment of the debt should be subject to the ratification of the legislature of the two states, and because citizen commissioners from the two states would be necessarily more familiar with the circumstances attending the creation of the said debt and other questions connected therewith. This joint resolution also invited Virginia to appoint three disinterested

citizens of that state as commissioners, with authority to treat with the commissioners theretofore authorized upon the part of West Virginia; but it was provided that their report should be subject to the approval and ratification of the legislature of the State of West Virginia and the general assembly of the commonwealth of Virginia. The Governor of West Virginia was directed by said resolution to communicate to the Governor of Virginia, without delay, certified copies of the preamble and resolution. (W. Va. Comp., vol. 1, pp. 449-54.) Accordingly, the Governor of West Virginia appointed three commissioners for the purpose aforesaid. This commission is known as the "West Virginia Debt Commission of 1871." After their appointment they proceeded to Richmond, where all the evidences of the receipt and expenditure of the money were kept, and there spent some time in the examination of such documents as were accessible. Realizing the necessity for further and more accurate information than they could obtain unassisted, they addressed a communication to the second auditor of Virginia, soliciting specifically the necessary information. To this request the second auditor made a reply in which he declined to furnish the information desired, a copy of which reply is filed as "Exhibit No. 2" of defendant's answer (R., p. 166).

Soon after their appointment the commission addressed a letter to the Governor of Virginia, notifying him of their appointment, their organization, and the duties put upon them, and requesting him to indicate at his earliest convenience what "channel of communication will be open to us." Nearly a month later they received from the Governor of Virginia a copy of a letter from him to the Governor of West Virginia, declining to recognize the West Virginia commissioners (W. Va. Comp., vol. 1, pp. 457-9). A few weeks later, in his message to the legislature, the Governor of Virginia "proceeds," to quote the language of the West Virginia Debt Commission, "to asperse the good faith of the State of West Virginia" (W. Va. Comp., vol. 1, p. 463). Having failed in their effort to obtain either the recognition or the co-operation of the Governor or the second auditor of Virginia, the commission left Richmond, because, as they say in their report, "further stay was not likely to add to the scant information

already gleaned by them from the public documents" (W. Va. Comp., vol. 1, p. 462).

The failure and refusal of Virginia to recognize, receive, or co-operate with the commissioners placed them at a great disadvantage, and they therefore obtained only such facts and figures as enabled them to make an imperfect report to the Governor of West Virginia with reference to the matters with which they were charged; and because of the incompleteness and inaccuracy of their report, and because it appeared therefrom, that in making their invetsigations they wholly disregarded the provisions of the ordinance of the Wheeling convention adopted August 20, 1861, and did not follow the method of settlement therein prescribed, their report was not adopted by the legislature of West Virginia. In 1873, the senate of West Virginia made an investigation of the subject of the debt, through its finance committee, of which J. M. Bennett, who was for eight years auditor of the old state of Virginia, and whose time expired when the city of Richmond was evacuated in 1865, was chairman. This committee made a report on December 22, 1873, from which it appeared that West Virginia upon a settlement with Virginia, based on the provisions of section nine of the ordinance, did not owe to Virginia anything whatever, but that, on the contrary, Virginia was indebted to West Virginia on account of said debt on January 1, 1861, in the sum of $512,000, not including interest. A copy of this report is printed in the record at page 166, as Exhibit 3 of defendant's answer.

A few weeks after the West Virginia Debt Commission of 1871 retired from Richmond after their fruitless endeavors there for recognition and co-operation, and after the Governor of Virginia had, in his message to the general assembly, questioned the good faith of West Virginia, Virginia passed her first funding act, that of 1871, in which she assumed two-thirds of the amount of the debt as her full share, and, *in violation and repudiation of section nine of the ordinance* of August 20, 1861, arbitrarily set aside the other one-third as West Virginia's portion. This is the more remarkable when it is remembered that she refers to and quotes from said section nine of the ordinance in the preamble of this act (R., p. 18). And to the same

effect were the funding acts of 1879, 1882, and 1892. The joint resolution of the general assembly of Virginia, approved March 6, 1894, to provide for adjusting the portion of the debt to be borne by West Virginia, and creating the Virginia Debt Commission, provides (R., p. 49):

> "But said commission shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof."

And the act of the general assembly of Virginia, approved March 6, 1900, is to the same effect, namely, that Virginia is liable for two-thirds only of the debt as her part thereof, which she has already provided for.

West Virginia, since the passage of the funding act of 1871—certainly since the adoption of the joint resolution of 1894,—could enter upon negotiations with Virginia upon no other basis. West Virginia must agree, as a preliminary to any such negotiations with Virginia, that Virginia was liable for two-thirds only of the debt, that this was her "equitable proportion," and that she has settled that. And what besides would it be held that West Virginia recognized or admitted or agreed to had she entered into negotiations with Virginia on such basis? This, that she had recognized that she was liable for the other third as *her* "equitable proportion"; for, it would be reasoned, that since it takes three thirds to make a whole, and as Virginia was liable for two-thirds only, West Virgina must be liable for the other third. It is and was not reasonable to ask that West Virginia should place herself in such a position, especially as it would have set aside the agreement West Virginia made with reference to her portion of the debt and the method of ascertaining the same contained in section nine of the ordinance.

West Virginia has never receded from the said provisions of the ordinance with reference to the settlement of her just proportion of the public debt of Virginia, but has uniformly adhered thereto throughout her history as a state. The resolutions adopted by her legislature in recent years, in which she declared that she did not owe

the state of Virginia anything on account of said debt, and would not negotiate with her concerning the same, were based upon the said report of the finance committee of 1873, upon Virginia's persistent refusal to recognize the basis of settlement provided for in said ordinance, and upon the conditions of negotiations dictated by Virginia in her said joint resolution of 1894 and said act of 1900.

After the said proposition of Virginia, made in 1871, to select arbitrators, which was declined by West Virginia, as hereinbefore stated, Virginia at no time signified her desire to settle with West Virginia the matters relating to West Virginia's proportion of said public debt, until after the adoption of said joint resolution approved March 6, 1894, whereby she had compromised and settled with her creditors and been released from all liability, which resolution provided that the commission thereby created should not proceed with negotiations with West Virginia until assurances should be received from the holders of a majority in amount of the certificates issued by Virginia under her funding acts, hereinbefore referred to, that they desired the commission to undertake such negotiations and would accept the amount so ascertained to be paid by West Virginia in full settlement of the one-third of the debt of the original state which had not been assumed by Virginia; and also that in no event should said commission enter into negotiations except upon the basis that Virginia was bound only for the two-thirds of the debt of the original state and which she had already provided for as her equitable proportion thereof. Under this resolution no negotiations were proposed to West Virginia until the year 1895, and then only upon the conditions prescribed in said joint resolution of 1894, which has never yet been repealed or modified in this respect. Negotiations were again offered by Virginia in 1906, but upon the same condition, that is, that West Virginia should enter upon such negotiations with the admission on her part that Virginia should be liable for two-thirds only of the debt, which was again declined by West Virginia.

It will be clearly seen, therefore, that the allegations in the bill that "attempts were made at different times by the public authorities of both the commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportion of

the common liability," is not supported to the extent and effect sought to be shown by the bill filed in this case.

It is averred in the bill that it was soon apparent that Virginia had by the act of March 6, 1871, assumed a heavier burden than she was able to bear, and other plans for the settlement of the debt were attempted to be made by the action of the General Assembly on March 28, 1879, and February 14, 1882, until at length, it is alleged, that a final and satisfactory settlement of the portion of the debt of the original state which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892. See R., pp. 21-47. Virginia files with her bill copies of each of these Acts of her General Assembly as exhibits Nos. 2, 3 and 4. It is also shown by the bill that Virginia by her Act of March 30, 1871, sought to fix her liability upon the basis of two-thirds of the original debt, and it is alleged that this was the intention of that act.

All Questions Arising Upon the Record of this Case Are Still Open for the Consideration and Decision of the Court.

Before entering upon the further consideration of the case, the attention of the Court is respectfully called to its former decision rendered upon the demurrer filed to the bill in this cause, appearing in 206 U. S. 290-322, the third point of the syllabus reading as follows:

> "The question whether the Commonwealth of Virginia has been released from all liability on account of the public debt evidenced by bonds of the state outstanding on January 1, 1861, will not be passed upon on a demurrer to a bill filed by that state against the State of West Virginia which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original State of Virginia which was assumed by West Virginia at the time of its creation as a state, but the consideration of such question will be postponed until the final hearing."

Again, in this case, reported in 209 U. S. 514-537, in the opinion of the Court referring this cause to a Master, specifying the matters

as to which the Master should report, the Court uses the following language:

> "The answers to these inquiries to be without prejudice to any question in the cause."

Inasmuch as the question of the release of Virginia by her creditors from all liability to her on account of the debt in question, and her lack of interest to prosecute this suit so far as it relates to the settlement of said debt, or the ascertainment of the just proportion thereof payable by West Virginia, is still open for consideration, these matters may, therefore, be properly argued on the hearing of the cause at this time, as well as all other questions that properly arise in the cause.

The Bill Sets Up Four Distinct and Independent Grounds in Respect to Each of Which Virginia Seeks Relief.

To intelligently argue this case, it is necessary to know just what Virginia seeks to recover by her bill. An examination of it discloses four distinct and independent grounds upon which she asks adjudication, and in respect to each of which she seeks a recovery against West Virginia.

The *first* of these grounds is that which relates to the part of the public debt held by third persons which Virginia alleges West Virginia should be required to assume and pay, and which Virginia has not paid and declines to pay, for the very substantial reason, as shown by her bill and its exhibits, that from its payment she has been exonerated by the acts and consent of her creditors, the holders thereof, and as to which she avers that she *sues in trust* for the benefit of those creditors or holders of said unpaid part of said debt who may be entitled thereto.

The *second* of these grounds is that which relates to the part of the said debt not held by third persons but which Virginia avers she holds in her Literary and Sinking funds, of which she herself, as she contends, is the owner, and as to which she sues in her own right and *not as trustee*.

The *third* ground is predicated upon the allegation that Virginia

has paid off or retired of principal and interest of said debt a sum considerably in excess of $25,000,000, which she owns in her own right, and on account of which she avers that she has "a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor." This claim she asserts in her own right.

The *fourth* and last ground in respect to which she asks a decree against West Virginia is based upon certain property which she avers was transferred to and became the property of West Virginia, under two acts of the legislature of Virginia passed respectively on the 3rd and 4th days of February, 1863, amounting, in the aggregate, as alleged in the bill, to several millions of dollars, the exact amount of which it is alleged the plaintiff is unable to state. This claim is also asserted by Virginia in her own right.

These four several phases of the bill will be presented and considered in the order we have here respectively designated.

Questions Arising Upon the Record for the Consideration and Decision of the Court.

First. Virginia has no interest in this suit, so far as it seeks to ascertain West Virginia's proportion of said debt, Virginia suing therefor in her alleged capacity as trustee; because no liability now attaches to Virginia in respect thereto, as Virginia has been released therefrom by the concurrent acts of herself and her creditors.

Second. Inasmuch as the bonds held by Virginia through the agency of her Literary and Sinking funds do not constitute any part of the debt within the meaning and contemplation of the ordinance of 1861, or the provision of the constitution of West Virginia adopted in 1862, Virginia cannot maintain this suit as to this phase of the bill; for the very cogent reason that these bonds are assets belonging to Virginia herself, and do not constitute a debt in any sense of the term.

Third. To authorize a suit for contribution, where the principle of this doctrine is applicable, it is absolutely essential that the party seeking contribution shall have paid more than his just share of a common debt. The very contrary appears from exhibit 3 filed with

plaintiff's bill (R. pp. 26-38) and made a part thereof. From the bill and this exhibit it appears that every dollar which Virginia ever paid on account of said debt was actually applied in reduction of that part of the debt which she herself assumed, and that no part thereof was ever applied upon the unfunded part which Virginia contends should be assumed and paid by West Virginia; and, inasmuch as West Virginia has not received any benefit whatever of any sum paid by Virginia, she is not liable to the plaintiff for contribution. It is clear, therefore, that Virginia can not maintain the bill as to this phase of the cause, predicated upon her alleged right of contribution.

Fourth. The plaintiff produced no proof of the *value* of the property embodied in the claim of Virginia against West Virginia, for property transferred by the former to and received by the latter by the act of February 3, 1863 (App. to R., p. 128) In the printed record the only evidence of this value is that furnished by West Virginia. West Virginia admitted that the value of the bank stocks received by her was $186,630.00. The Special Master found that the value of the other property so received by West Virginia was $73,578.00 (Report, pp. 181-193). Hence, if Virginia can maintain this suit as to this feature of her bill, she could recover only the sum of $260,208.00.

Fifth. But Virginia has blended in this suit, with the claim which she asserts in her representative capacity as trustee, various other claims which she asserts in her own right, thus clearly creating a *multifarious* demand, which cannot be asserted in one and the same cause, unless the court shall be constrained for convenience' sake to treat those demands which she asserts in her own right as mere matter of surplusage and not entitling her to any relief on account thereof.

Sixth. Treating then the claims which Virginia asserts in her own right as not proper subjects for relief but as surplusage, Virginia has no claim whatever, as shown by the bill and its exhibits, which she can sustain in this cause; and therefore the whole bill must be dismissed.

The propositions which we have here presented, and which clearly arise upon the record in this cause, will be discussed in the order named; and in our argument we will consider the various acts of legislation adopted by the State of Virginia which ultimately resulted

in her release from any and all liability regarding the unfunded part of the Virginia debt created before and existing on January 1, 1861. It is clear that this is the date from which we must reckon, because this date is fixed by the ordinance of Virginia herself in section 9 thereof (R. p. 146), and the constitution of West Virginia adopted in 1862 (R. p. 147), and to the provisions whereof Virginia gave assent and therefore accepted as the condition of her assent to the formation out of her territory of the new state (R. p. 165).

Virginia Has no Interest in this Suit so far as it Seeks to Ascertain West Virginia's Proportion of Said Debt.

Virginia has no interest in this suit so far as it seeks to ascertain West Virginia's proportion of the debt, because any part of the debt which West Virginia may have assumed by reason of the ordinance or her constitution was direct to the creditors and not to Virginia; and because no liability now attaches to Virginia in respect thereto, as Virginia has been released therefrom by the concurrent acts of herself and the creditors.

Following in consecutive order the propositions arising on the record, we necessarily begin with the consideration of the Wheeling Ordinance and the first Constitution adopted by the State of West Virginia.

Any assumption of any part of the public debt that West Virginia may have taken upon herself by reason of the Wheeling Ordinance of August 20, 1861, or by reason of the West Virginia constitution of 1862, was to the creditors and not to the Commonwealth of Virginia. Both the terms of the Ordinance and of the Constitution relating thereto are clear and distinct, and show that West Virginia did not assume to pay any part of the public debt to Virginia. That part of said Ordinance relating thereto is as follows:

> "Sec. 9. The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any

part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period." * * * *

"Sec. 10. When the general assembly shall give its consent to the formation of such new state, it shall forward to the congress of the United States such consent, together with an official copy of such constitution, with the request that the said new state may be admitted in the union of states." App. to R., p. 122.

That part of the West Virginia Constitution referred to in section 10 of said Ordinance is as follows:

"Sec. 8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State: and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." App. to R., p. 125.

From the foregoing it clearly appears, therefore, that the Commonwealth of Virginia had full knowledge that any assumption West Virginia made of any part of the public debt was to the creditors and not to the Commonwealth of Virginia. The terms of said Ordinance and the provisions of the West Virginia Constitution were known to Virginia. Section 3 of the act of the General Assembly of Virginia passed May 13, 1862, required the Governor of Virginia to transmit to the senators and representatives of Virginia in Congress, said act of the General Assembly and a "certified original of the said Constitution and schedule." App. to R., p. 126.

That the assumption was to the creditors, and not to Virginia, is evident not only from the words of the Ordinance and the Constitution, but also from the condition of the times. The people of Virginia inhabiting that part which became West Virginia were loyal to the Union; they adhered to and were under the jurisdiction of a government which was in a state of war with the government to which what

is now the State of Virginia adhered and was loyal. The two states of Virginia and West Virginia were in armed conflict. Virginia had "suspended," or postponed until after the end of the war, her obligations to those citizens, including those of West Virginia, who adhered to the Union. She "repudiated" that part of her debt, and the interest thereon, held by citizens loyal to the Union. She held up the property of the citizens of West Virginia who adhered to the Federal government. The Ordinance and the Constitution were framed under these conditions—in a time of war; when it was impossible to forecast the result of that war; when no victory had favored the Union cause, but when the victories favored the cause of the Southern Confederacy; indeed, when the chances favored the success of the Confederacy, and the creation of another nation in the territory of the Federal government seemed probable. It would be most unreasonable to suppose that West Virginia would, under such conditions, agree to pay money over to Virginia for the benefit of West Virginia's own citizens who were at that time the creditors of Virginia. It would be most reasonable that West Virginia would look to the interests of her own citizens, and that any money she should pay would be paid so as to protect their interests. And this is what she did do. And hence she agreed to take upon herself or assume a just or equitable proportion of the debt; but provided that this proportion should be ascertained by *her own legislature*. There is nothing in the compact that she would consult Virginia either as to the portion she would pay or as to the persons to whom she would pay it. To this agreement and compact Virginia assented. Upon this agreement and compact, Virginia assenting, West Virginia was admitted into the Union. It is fundamental that, while courts can enforce agreements between parties, they cannot make agreements for parties; they can only enforce the agreements the parties have made.

The lawfully Restored Government of Virginia, when she framed the ordinance for the creation of the new state (R., p. 6), and when she gave consent for the admission of West Virginia into the Union, did not contemplate that any part of the public debt should be paid by West Virginia to the mother state; nor would Congress, under the conditions then existing, have given its consent to the admission

of West Virginia if it had been understood that the said ordinance and the constitution provided that the share of the public debt which West Virginia would pay was to be paid to the old state. It was the understanding of the Restored Government of Virginia, of the framers of the constitution of West Virginia, and of Congress, that payment would be made direct to the creditors of Virginia, and not to the state of Virginia. The circumstances attending the passage of the act of Congress admitting West Virginia into the Union clearly indicate this. In support of this proposition, we quote from Exhibit No. 8 of plaintiff's bill the following excerpt:

> "A brief extract from the debates, when the bill providing for the admission of West Virginia was under consideration, will serve my purpose tonight:
>
> "MR. OLIN: 'I desire to ask what will become of the bonds and other obligations which Virginia has issued or incurred by the recognition of a new state?'
>
> "MR. HUTCHINS: 'I will answer my friend from New York. Here is the provision of the constitution of West Virginia in reference to that matter: An equitable portion of the debt of Virginia prior to January the first, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable.'"
>
> "MR. CRITTENDEN: 'There is another question; the State of Virginia owes a large debt. How is this debt to be divided?'"
>
> "MR. BLAIR: 'The constitution framed by the convention of the people of the proposed new state binds the new state to pay its just proportion of the debt owed by Virginia prior to the ordinance of secession.'"
>
> "MR. CRITTENDEN: 'I only knew that in this bill there was no provision made for a division of the said debt. The gentlemen tells us there is a provision made for it in the constitution, and I am satisfied with that. As it has been attended to, I have no more to say about it.'" (Record, pp. 80, 81.)

For the original of the above quotations from the debates in Congress, see pp. 45-47 of Congressional Globe, Part I., 3d sess. 37th Cong. 1862-63.

From that debate we add the following quotation from the speech of Representative Edwards (p. 47):

> "But it is said, further, that there may be some difficulty about the public debt of Virginia. Well, sir, if Virginia remains in rebellion, if she succeeds, in conjunction with others of the southern states, in establishing the independence of the southern confederacy, where then, I ask, will the creditors of that state, many of them living in the northern states, go for the collection of their debts? What is the market value of the securities of the state now under the circumstances of her rebellion? Sir, if I had bonds of that state in my possession, I should consider them worth far more with the new state of Western Virginia in the Union as a free state, with her industrious population, she having provided in her constitution to assume her just proportion of all the debts of the state, than if the old state remained entire and wasting the resources of both its eastern and western portions in supporting the rebellion."

It seems clear that the solicitude of Congress related to the holders of the debt, and it was believed by them that these creditors would have the right to look to the new state for payment to them of the just and equitable proportion of the debt she had assumed. The question asked by Mr. Crittenden, and his comment on the reply to it, and the remarks of Mr. Edwards, and, indeed, the whole course of the debate, so far as it touched the debt question, go to show that it was contemplated by all the parties that payment would be made to the creditors and not to the State of Virginia. There is no reason to believe that it was the intention of either the Restored Government of Virginia, or of Congress, that West Virginia was to assume a just or equitable proportion of the public debt of Virginia and then turn the same over to the old State of Virginia, the greater part of whose territory was then in rebellion against the Federal Government and held by armies in hostility to that government. Why would the Federal Government, under such circumstances, concern itself about the fiscal affairs of the rebellious government of Virginia? There was every reason, however, why Congress should concern itself about

the interest of the loyal creditors of Virginia; and the same sentiment which prompted Congress to have solicitude for the interest of such creditors, would also prompt the loyal Restored Government of Virginia concerning them. At that date there could be no negotiations between West Virginia and the old state; nor could it be told with any certainty how soon in the future there could be such negotiations between them, because the result of the war was at that time very uncertain, and no one could tell either what the result of the war would be nor how long it would continue, nor *what would be the conditions after its close.* The language of the ordinance and of the constitution of West Virginia is that West Virginia should assume or take upon herself and pay a just or an equitable proportion of the debt. But, very significantly, neither instrument declares it should be paid to Virginia. If the intention had been to pay it to Virginia, then it would seem a reasonable assumption that it could not be paid to Virginia until the amount was ascertained by negotiations between the two states. In other words, if it was the contemplation that whatever West Virginia was liable for was a liability to Virginia, then it would follow that Virginia should have something to say about the amount thereof. But the constitution of West Virginia distinctly provided that the legislature of West Virginia alone should ascertain the amount; and this was agreed to by both the Restored Government of Virginia and the Congress of the United States, the former in giving its consent to the formation of the new state, and the latter by its act admitting West Virginia into the Union.

This is the view taken by the Supreme Court of Appeals of the Commonwealth of Virginia, in the case of *Higginbotham* v. *Commonwealth*, 25 Gratt. 627, decided in 1874, and cited by Virginia in her brief in this cause. It was upon this principle of a direct liability from West Virginia to the creditors, that Virginia based her first act of March 30, 1871 (R., p. 17), whereby she funded a large amount of the public debt upon the basis of two-thirds to herself and one-third to West Virginia. It was upon this principle that she passed the acts of March 28, 1879 (R., pp. 21-26), and of February 14, 1882 (R., pp. 26-38), and of February 26, 1892 (R., pp. 38-47). It was upon this principle that Virginia adopted her joint resolution

approved March 6, 1894 (R., p. 49). It was upon this principle that Virginia passed the act of March 6, 1900 (R., p. 50). It was upon this principle of construction that Virginia waived, in said funding acts of 1871, 1882 and 1892, the clause in her constitution of 1869, which provided that such part of the public debt as should be assumed by West Virginia should be applied to the discharge of said debt. It was also upon this principle of construction that Virginia superseded section 19 of article 10 of her constitution of 1869 by her constitution of 1902, in the latter of which she impliedly remits the holders of the unfunded part of her debt to the State of West Virginia for the direct payment thereof.

We next take up in consecutive order the consideration of those acts whereby Virginia was ultimately released from all liability as to that part of the state debt which she has assumed to be her just portion thereof. The first of which is the

Act of 1871,

which had for its express object the funding of said debt and the fixing, upon her own basis, of Virginia's proportion thereof, and remitting her creditors to West Virginia for the payment of the residue. This act, which is filed as exhibit number 1 with plaintiff's bill (R. p. 17), contains the following recital:

> "Whereas in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas, in the Ordinance authorizing the organization of said state, it was provided that the said state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, eighteen hundred and sixty-one, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this state, and will continue to be made as long as may be necessary; and whereas the people of this commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and whereas it

has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof and not to this state, as the constitution of this state provides; now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due; therefore,

"1. Be it enacted," etc. (R., p. 18.)

The act then provides:

> "That from and after its passage * * * no bond, certificate or other evidence of indebtedness shall be issued for any portion of the debt of this state; nor shall any interest be paid upon any part or portion of said debt except as hereinafter provided." (R. p. 18.)

The act then provides for the funding of the two-thirds of the debt, with its accrued and unpaid interest to the first day of July, 1871, to bear interest at the rate of six per cent per annum, to be due and payable in thirty-four years from date, redeemable at the pleasure of the state, the bonds to be made payable to order or bearer, the coupons to be paid semi-annually and receivable for taxes and other debts due the state (R. 18). The third section of the act provides for the surrender of the old and the acceptance of the new bonds for two-thirds of the amount of said debt, and the issuance of a certificate, bearing the same date as the new bond, for the other one-third of the debt, "and that payment of said amount, with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be made between the states of Virginia and West Virginia in regard to the public debt of the state of Virginia existing at the time of its dismemberment, and that the state of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees. * * * The remaining one-third of unpaid interest, both on the bonds and certificates, shall be

payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia." (R. p. 19.)

Section 4 of this act provides:

> "The treasurer, by proper endorsement, written or stamped, upon each bond, certificate of stock or interest certificate so surrendered and delivered to him, shall cancel the same, and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law." (R. p. 20.)

An examination of this act discloses that provision is made only for the payment of the new bonds funded under this act and the interest accruing thereon. By this act Virginia signifies to her creditors that she will pay no bond or any part of said debt except the two-thirds thereof provided for in this act, nor any interest thereon except upon the bonds issued by her to cover said two-thirds.

The provisions of this act were accepted by a large number of her creditors, as shown by the number of certificates issued under it, which amounted on January 23, 1905, to $10,639,776.42 (R. p. 55.)

The acceptance of the provision of this act by the creditors constituted between them and Virginia a lawful contract, as declared by this court in *Hartman* v. *Greenhow*, 102 U. S. 672 (26 L. Ed. 271). The consideration of this valid contract was based upon the negotiability and receivability of the coupons for taxes and other dues owing to the state, written on their face, and the conditional promise of Virginia to pay the unfunded part of said debt. This act did leave a conditional liability upon Virginia to pay or provide for the payment of the unfunded debt of the Commonwealth represented by certificates issued by her, from which she could not relieve herself without the assent of her creditors; but Virginia was relieved from this conditional liability by the consent of the creditors, and the subsequent acts of the Commonwealth relating to the debt, and hereinafter cited.

Act of 1879.

To obtain a reduction of the rate of interest upon the two-thirds

of said debt assumed by Virginia, this act (1879) was passed, the recital in such act declaring that,

> "The council of foreign bondholders of London, England, and the funding association of the United States of America, limited, have, in view of this belief expressed their willingness to jointly endeavor to obtain the consent of the creditors to an abatement in the rate of interest." (R., p. 21.)

The act, to effectuate its purpose, divides the outstanding indebtedness of the state into two classes, as follows:

> "Class I., which shall be taken to include all tax-receivable coupon bonds, and all registered bonds and fractional certificates which are convertible under the act approved March thirtieth, eighteen hundred and seventy-one, into such tax-receivable coupon bonds
>
> "Class II., which shall be taken to include all bonds funded under the act approved March thirtieth, eighteen hundred and seventy-one, as amended by the act approved March seventh, eighteen hundred and seventy-two; and also two-thirds of the face value, with two-thirds of the unpaid accrued interest up to the first of July, eighteen hundred and seventy-one, on all unfunded bonds, including sterling bonds." (R., p. 22.)

It will be seen that this act deals with the entire debt, both that funded under the act of 1871 and that not so funded, and of that so unfunded this new act provides for the funding of two-thirds of it at its face value with two-thirds of its unpaid accrued interest.

The act is made effectual upon the following condition, provided in the act as part of section 5 thereof:

> "If on or before the first day of May, eighteen hundred and seventy-nine, the council of foreign bondholders and the funding association of the United States of America aforesaid, shall file with the governor their assent to and acceptance of the terms of this act, the same shall be taken to be a contract between the state and the said corporations, and the governor shall forthwith provide for the preparation of the bonds provided for by this act." (R., p. 23.)

The act also provides for the funding of the entire debt, on the basis of two-thirds thereof assumed by Virginia, and gives, in effect, an indefinite period for such purpose (R., p. 23.)

Provision is made by section 6 of this act for the cancellation of the bonds surrendered under it (R., pp. 23, 24), and section 7 thereof provides as follows:

> "The owners of all classes of bonds mentioned in this act, who shall exchange their securities for the bonds created under this act and who shall not have yet received certificates representing the remaining one third of their principal and interest, due and payable by the state of West Virginia, shall receive certificates of a like character to those issued under the act of March thirtieth, eighteen hundred and seventy one, when they make such exchange; and the state of Virginia will negotiate or aid the creditors holding all of such certificates issued under this act, or previous acts, in negotiating with the state of West Virginia for an amicable settlement of the claims of such creditors against the state of West Virginia. The acceptance of the said certificates for West Virginia's one-third, issued under this act, shall be taken and held as a full and absolute release of the state of Virginia from all liability on account of said certificates." (R., p. 24.)

The act provides in section 8 thereof for the payment of interest on the bonds issued thereunder (R., p. 24). The act also provides for a sinking fund to pay the principal of the bonds (section 9; R., pp. 24, 25). It repeals all acts inconsistent with it, and therefore repeals the act of 1871 and the acts amendatory thereof. The rate of interest under the act of 1871 was six per cent per annum (R., p. 18); while under this act the annual rate was three per cent for ten years, four per cent for twenty years, and five per cent for ten years (R., pp. 21, 22).

Act of 1882.

The following is the title of the act of 1882:

> "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing

at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon." (R., p. 26.)

To this act there is this preamble:

> "Whereas to the end which this act comprehends, a full statement of the debt is essential; and whereas the following has been carefully made up from the records of the second auditor's office of the state, it is confidently submitted as presenting a true state of the account between the state and her creditors—the account is as follows." (R. p. 26.)

Then follows a full statement of the account of the debt as between Virginia and the holders thereof.

On January 1, 1861, there were three classes of this debt:

Sterling, bearing 5 per cent interest---	$ 1,973,000.00
Dollar, bearing 6 per cent interest---	29,533,582.90
Guaranteed, bearing 6 per cent interest	294,130.00
Total ----------	$31,800,612.90

Interest on this debt:

Past due and uncalled for -- ---------	$101,023.63
Maturing at this date, January 1, 1861--	944,156.38
Total ----------	$1,045,180.01

Then follows a statement of the debt as of July 1, 1863, amounting to $33,141,212.12. This is followed by a statement of accrued interest to July 1, 1863, amounting to $5,954,716.08. Of this total principal as of July 1, 1863, Virginia assumes two-thirds as her "equitable portion," which is $22,094,141.96. Of this total amount of interest Virginia assumes two-thirds, which is $3,969,810.72; an aggregate of principal and interest of $26,063,952.38.

Virginia continues this statement in detail to July 1, 1882, crediting herself and charging to her creditors all payments made by her on account of said debt from January 1, 1861, to July 1, 1882, making an aggregate balance of $21,035,377.15, principal and interest, and inclusive of $1,428,245.25 held by the literary fund of the state and

$602,016.90 as interest on such fund (R., pp. 27-32). This total sum of $21,035,377.15 represents two-thirds of the debt, principal and interest, as of July 1, 1882, after deducting everything ever paid by Virginia on account of said debt during the period between January 1, 1861, and July 1, 1882—a period of twenty-one and one-half years.

The act then continues with an extended recital classifying this debt, stating her intention to provide a uniform rate of interest, treating the said sum of $21,035,377.15 as,

> "the amount of Virginia's equitable share of the debt of the old and entire state, as the same is ascertained and now formally declared by the foregoing account" (R., pp. 33, 34).

Then follows sections 1, 2, 3 and 4 of the act, authorizing the issuance of new bonds for said debt, prescribing the form of the bond, fixing therein the rate of interest at three per cent per annum, and the form of the coupon to accompany the bond (R., pp. 34, 35). Section 5 of the act prescribes the denomination of the bonds to be issued in exchange for the outstanding indebtedness of the state as enumerated in the act for "her equitable share" (which the act fixes as we have seen at two-thirds of the original debt after deducting therefrom all money paid by her on account thereof) of each class as shown in the recital to the act (R., p. 33), extending from A to F inclusive. For her equitable share of class A she refunds at 53 per cent; class B at 60 per cent; class C at 69 per cent; class D at 80 per cent; class E at 69 per cent; class F at 63 per cent. (R., pp. 35, 36.)

Section 6 of this act of 1882 provides as follows:

> "For all balance of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate as follows:
>
> "No._____
>
> "The commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for _____ dollars, held by _____, dated the _____ day of _____ and numbered _____, to be accounted for by the State

of West Virginia, without recourse upon this commonwealth.

"Done at the capitol of the State of Virginia, this ------ day of ----------, eighteen ----------

----------, Second Auditor.

----------, Treasurer."

(R., p. 36.)

It is prescribed in section 8 of this act:

> "All the bonds and certificates of debt and evidences of past due and unpaid interest taken in under the provisions of this act, shall be canceled by the treasurer in the presence of the board of commissioners of the sinking fund as the same are required, and by the treasurer the same shall be carefully preserved until such time as the general assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so canceled from time to time shall be certified by said board and filed with the treasurer for preservation." (R., p. 37.)

The act, in section 11, provides for a sinking fund (R., p. 37), in section 13 for the payment of interest on the bonds issued under the act (R., p. 38), and section 15 declares:

> "That from and after the passage of this act, no bonds, certificates, or other evidences of indebtedness, shall be issued for any portion of the debt of this state, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided."

Act of 1892.

While the act of 1882 contemplated and provided for the funding of all the said debt assumed by Virginia and her release from the balance thereof, in March, 1890, as appears from a recital in this act of 1892 (R., p. 38), it had not all been funded by said act of 1882; so that in March, 1890, a commission was appointed on the part of Virginia to receive propositions for funding the debt of the Commonwealth not funded under the act of 1882, known as the "Riddleberger bill" (R., p. 38).

This act recites as a fact that,

"said Virginia debt commission has submitted a report to the general assembly, wherein it appears that under a certain agreement, dated May twelfth, eighteen hundred and ninety, lodged with the Central Trust Company of New York, Frederick P. Olcott, William L. Bull, Henry Budge, Charles D. Dickey, Junior, Hugh R. Garden and John Gill, constituting a committee for certain of the creditors of Virginia, called the 'Bondholders' committee,' have proposed to said commission to surrender to the state in bulk not less than twenty-three million of dollars of the public debt, unfunded under said act approved February fourteenth, eighteen hundred and eighty-two, in exchange for an issue of new bonds, as hereinafter specified, the same to be apportioned between the several classes of creditors by a tribunal which the said creditors have themselves appointed; and that, in pursuance of said proposal an agreement has been entered into unanimously between the said commission and the said bondholders' committee, subject to approval by the general assembly, whereby in exchange for the said unsettled obligations of the state held by the public, which were issued prior to February fourteenth, eighteen hundred and eighty-two (exclusive of evidences of debt held by the public institutions of the commonwealth pursuant to law and by the United States) together with the interest thereon to July first, eighteen hundred and ninety one, inclusive, aggregating about twenty-eight million of dollars, there shall be issued nineteen million of dollars of new bonds, dated July first, eighteen hundred and ninety one, and maturing one hundred years from said date with interest thereon at the rate of two per centum per annum for ten years from said first day of July, eighteen hundred and ninety-one, and three per centum per annum for ninety years thereafter to the date of maturity, said interest to be payable semi-annually, of which aggregate debt of about twenty-eight million of dollars the said bondholders' committee represent that they now hold and agree to surrender not less than twenty-three million of dollars; and

"Whereas said report and agreement contemplate the

surrender of the obligations held by the bondholders' committee as an entirety, and do not contemplate an apportionment by the general assembly between the various classes of creditors so represented by said bondholders' committee, the same having been committed to a distributing tribunal, as hereinbefore recited; and

"Whereas it is the desire and intention of the general assembly that a settlement of all the other outstanding obligations of the state (except those issued under the act of February fourteenth, eighteen hundred and eighty two, the evidences of debt held by the public institutions of the state in pursuance of law and by the United States) as well as those controlled by the bondholders' committee, as aforesaid, shall be made under the provisions of this act." (R., pp. 38, 39.)

This act provides in the first section, that the sinking fund commissioners do issue nineteen million of dollars in bonds in lieu of the twenty-eight million dollars outstanding not funded under the act of 1882 (R., p. 39); in the second section, the date of the bonds, when payable, the rate of interest (two per cent for the first ten years and three per cent for the remaining ninety years), and for the redemption of the bonds (R., pp. 39, 40). The third section prescribes the form of the bond, and the fourth the form of the coupon (R., pp. 40, 41). Section 5 is divided into paragraphs, the first of which prescribes the denominations of the bonds. The other paragraphs are designated by capital letters from A to E inclusively (R., pp. 41-43). Paragraph C provides that after the presentation of not less than twenty-three million dollars:

"after deducting one-third of the principal and interest of such obligations as were issued prior to the thirtieth day of March, eighteen hundred and seventy-one, and also deducting one-third of the principal and interest of such obligations as were issued under the act approved the thirtieth day of March, eighteen hundred and seventy-one, as do include West Virginia's proportion, said bondholders' committee may at any time on or prior to the thirtieth day of June, eighteen hundred and ninety-two, present the same in bulk to said commissioners for surrender and exchange as herein provided." (R., p. 42.)

Paragraph D provides that:

> "The said new bonds shall be issued to said bondholders' committee by the said commissioners in the following proportion, to-wit: nineteen thousand dollars of the new bonds to be created under this act shall be issued for every twenty-eight thousand of old outstanding obligations (principal and interest to July first, eighteen hundred and ninety-one), as aforesaid, surrendered by said bondholders' committee to the said commissioners, after the deductions provided for in paragraph C of this section; and a proportionate amount of said new bonds shall be issued for smaller sums of said outstanding obligations so surrendered, provided that no certificates issued on account of the proportion of West Virginia of the obligations of the states shall be funded under this act." (R., p. 43.)

After thus carefully providing for a refunding of that part of the debt not funded under the act of 1882, section 6 of said act of 1892 provides as follows:

> "For all balances of the indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share of the bonds authorized to be exchanged under this act, the said share having been heretofore determined by the Commonwealth of Virginia, the said commissioners shall issue certificates substantially in the following form, viz.:
>
> "No. ------. The Commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for ------ dollars, dated ------ day of ----------, and No. ------, leaving a balance of ---------- dollars with interest from ----------, to be accounted for to the holder of the certificate by the state of West Virginia, without recourse upon this commonwealth.
>
> "Done at the capitol of the State of Virginia, this ------ day of ----------, eighteen hundred and ninety-two.
>
> ----------, Second Auditor.
>
> ----------, Treasurer."
>
> (R., pp. 43, 44.)

Section 9 of this act provides that:

> "All the bonds and certificates of debt, and evidences of past due and unpaid interest, taken in under the provisions of this act, shall be canceled by the treasurer in the presence of the commissioners of the sinking fund, or a majority thereof, as the same are acquired, and by him carefully preserved, subject to disposition by the general assembly, a schedule of the bonds, certificates, and other evidences of debt so canceled shall be certified by said commissioners and filed by the treasurer for preservation." (R., p. 45.)

Section 10 of this act provides for a sinking fund for the payment of the bonds issued under this and the act of 1882, and for their cancellation, and it also provides for the cancellation of all bonds issued under the act of 1882 and held by the commissioners of the sinking fund at the time said act of 1892 was approved,

> "as soon as at least fifteen million of dollars of new bonds shall have been issued and delivered pursuant to the provisions of this act" (R., p. 46).

The thirteenth section of said act of 1892 provides for the payment of the interest on the bonds issued under it, as the same shall become due and payable (R., p. 46). Section 16 repeals the act of 1882, and all other acts amendatory thereof (R., pp. 46, 47).

It will be perceived that the act of 1871 was repealed by the act of 1879, as the two acts were inconsistent with each other, if not expressly repealed by the repeal therein of the act of 1878, as it was in substance an amendment and re-enactment of the act of 1871 (R., p. 26); and the act of 1882 repealed the acts of 1879 by implication, as it treated the adjustment and settlement of the debt, so far as the liability thereon of Virginia is concerned, as an entirety. That such repeal was so effected by the act of 1882, we submit the following authorities:

In *Grant* v. *Railroad Co.*, 66 W. Va. 175, this subject of the repeal of a statute by implication, where a subsequent statute deals with the subject as an entirety, is fully considered and the authorities cited. The opinion in that case deals with the repeal of a statute by implication, resultant upon the enactment of a subsequent act dealing with the subject as an entirety. The court said:

"The principle applied here has been stated by the Supreme Court of the United States in the following terms: 'Where the later of two acts covers the whole subject matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one, though the two are not repugnant. *District of Columbia* v. *Hutton*, 143 U. S. 18. This Court in *Herron* v. *Carson*, 26 W. Va. 62, has stated it in these terms: 'A subsequent statute revising the whole subject matter of a former one and evidently intended as a substitute for it, though it contains no express words to that effect, must, on principles of law as well as in reason and common sense, operate a repeal of the former law; it has been applied by this Court in other cases. *State* v. *Harden*, 62 W. Va. 313; *State* v. *Mines*, 38 W. Va. 125. Scores of additional cases of the same class could be enumerated. See *United States* v. *Claflin*, 97 U. S. 546; *Eckloff* v. *District of Columbia*, 135 U. S. 240; *Morris* v. *Crocker*, 13 How. (U. S.) 429; *Mitchell* v. *Brown*, 1 Ell. & Ell. 267; *Parry* v. *Croydon Gas Co.*, 15 C. B. (N. S.) 568; *Heckman* v. *Pinckney*, 81 N. Y. 211; *United States* v. *Tyneu*, 11 Wall. 88; *Commonwealth* v. *Killiher*, 12 Allen (Mass.) 480; *State* v. *Campbell*, 44 Wis. 529. Under this rule the implication does not rest on inconsistency or repugnancy, in the restricted sense in which these terms are generally used. It arises as a matter of legislative intention, disclosed by the character of the act, its title or preamble, and subject matter, and inconsistency, so far as it may be deemed to enter into the inquiry, is of a broader kind, namely, inconsistency between the old law and the legislative intent shown by the new. It is not inconsistency or repugnancy between words, phrases or clauses, considered as such, but inconsistency between the acts considered as entireties."

The act of 1892 refunded every part of the debt created by Virginia prior to January 1, 1861, except the one-third thereof which she claims is West Virginia's proportion; and, as to such unassumed and unfunded part, the act remits the holders thereof to West Virginia

without recourse upon the Commonwealth of Virginia. The holders of the part of the debt assumed by Virginia assented to its settlement under the acts of 1882 and 1892, in the manner therein prescribed. Of this the exhibits filed with the bill and made a part thereof afford full proof.

The Status of Virginia as to Her Unfunded Debt by Virtue of the Provisions of Her Four Legislative Acts of 1871, 1879, 1882 and 1892.

Virginia, in her act of 1871, declaring its object and clearly expressive of its purpose, says:

> "Now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other matter of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon *her proportion of said debt* as the same shall become due, therefore,
>
> "1. Be it enacted," etc. (R., p. 18.)

Section 3 then provides for the issuance of certificates for the unfunded part of the said debt, alleged by Virginia to be West Virginia's proportion thereof, providing that,

> "payment" (of such unfunded debt) "will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia at the time of its dismemberment" (R., p. 19).

Thus, Virginia settled with her creditors for two-thirds of the debt, funded in new bonds drawing six per cent interest, with the understanding that the bonds unfunded and canceled, surrendered to Virginia, represented by the certificates delivered to the owners, should be held by Virginia *in trust*, to be paid in accordance with a settlement to be made at some future time with West Virginia. It will be seen that Virginia conditionally promises to pay the unfunded part of the debt under the act of 1871, dependent upon the contingency of a

subsequent settlement with West Virginia; payment to be in accordance with such settlement, and no interest is payable on any part of the debt not funded under the act.

It will be observed that this act treats the two-thirds which Virginia assumes as *her proportion of said debt.* All the creditors accepting the provisions of this act thereby assented to this as her portion to be assumed and paid by her, and the residue as West Virginia's proportion, as stated in the act, and with which Virginia was only connected or in which she was only interested under a conditional promise.

The act of 1879 repealed all acts inconsistent therewith and also the act of March 14, 1878 (R., p. 26), and provided again for the funding of the debt, as of the date of January 1, 1879, the principal payable forty years thereafter, bearing interest annually at the rate of three per cent for ten years, four per cent for twenty years, and five per cent for ten years, payable in the cities of Richmond, New York and London, as provided in the bonds issued thereunder (R., pp. 20, 21).

This act of 1879 provided that upon the filing with the governor of the assent of the representatives of the holders of the debt to an acceptance of the terms of this act, such acceptance should create a contract between the Commonwealth and said corporations—that is, the foreign bondholders' and funding associations, treated as corporations, representing the holders of the debt. This assent was accordingly filed. Therefore this act of 1879 created a new and different contract as to the entire debt from that which existed between the Commonwealth and the holders of the debt under the act of 1871. The characteristics or distinguishing features of this contract so created by the act of 1879 were:

First, that the state of Virginia would negotiate, or aid the creditors holding all certificates issued under the act of 1879 or previous acts in negotiating with the state of West Virginia for an amicable settlement of the claims of such creditors against the state of West Virginia, thus relieving her from her conditional liability created as to the unfunded bonds under the act of 1871.

Second, the acceptance of certificates under this act of 1879 for West Virginia's alleged one-third was taken and held as a *just and absolute*

release of the Commonwealth of Virginia from all liability on account of said certificates.

Thus it is seen that Virginia was expressly released from all liability as to the certificates issued under the act of 1879; and as to the certificates issued under the act of 1871 there was substituted for her conditional liability a promise on her part either to negotiate herself directly with West Virginia or to aid the creditors holding the certificates issued under both acts of 1871 and 1879 in negotiating with West Virginia for an amicable settlement of West Virginia's alleged one-third of said debt, being the unfunded portion thereof not assumed by Virginia under said act.

It appears that there had been issued on December 14, 1904, $12,910,555.89, of which $10,639,776.42 were issued under the act of 1871. So that Virginia was released by the very words of the act of 1879 of more than $2,000,000 of the unfunded debt, and released of the residue (amounting to more than $10,000,000) by the acceptance of the terms of the act by the representatives of the holders of all the debt.

Third, another characteristic of the new contract made by Virginia with the holders of the debt under the act of 1879 was the very large reduction of the interest from that provided under the act of 1871.

By the act of 1882 Virginia makes a statement of her entire debt as existing before and on January 1, 1861; and upon the basis of this statement she makes an entirely new contract with reference to the entire debt. This act, thus forming a new contract, is assented to by her creditors. The characteristic changes made under this new act are:

First, a scaling of the debt whereby she pays a certain percentage of each class of bonds (R., pp. 35, 36).

Second, by this she effects a large reduction in the amount of the two-thirds of the debt which she had theretofore assumed under the acts of 1871 and 1879, and secures more favorable terms of interest and changes the place of the payment of the interest, the rate of interest by this act being fixed at three per cent and the place of payment at Richmond, Virginia (R., pp. 34, 35).

After thus fixing the basis of her liability upon the scaling of the debt at the rate designated in the act, the act then arbitrarily prescribes

that "for all balances of such debt, constituting West Virginia's share of the old debt," a certificate shall be issued to be accounted for by the state of West Virginia without recourse upon Virginia (R., p. 36). Virginia thus arrogated to herself the right to fix the amount to be paid by West Virginia without West Virginia's consent and without legal authority.

It will be observed that by this act it is not the certificates issued under it, if any were issued, as to which Virginia is released, but she is released by the terms of the act "for all balances of such indebtedness, constituting West Virginia's share of the old debt." This act provides, as we have seen, for the surrender of all bonds ever issued by Virginia, whether prior to 1861 or subsequent thereto, and for their cancellation. This act of 1882 by its very terms necessarily repealed all previous acts of Virginia relating to the public debt, and creates an entirely new contract between her and her creditors with reference thereto. It is true that the creditors did not bring in the certificates and surrender them which had been issued to them under the acts of 1871 and 1879, for the reason that these certificates represented definitely the unfunded portion of the entire debt, the very part that Virginia declines to assume under the act of 1882, and for which she provides that certificates shall be issued without recourse upon her, and for the very substantial reason that these certificates only represented that part of the debt from which Virginia had been released by the concurrent acts of herself and the holders of these certificates; and they accurately represented the part of the debt which Virginia declined to assume, and specifically designated the bonds for which the certificates were given, being the bonds of the old debt existing prior to and on January 1, 1861. Wherefore, then, bring in the old certificates and take new ones? To do so would not affect the relationship of the holders with reference to the unfunded debt, nor would it affect the liability of Virginia, because she had already exonerated herself, as we have seen, from even a conditional liability by virtue of the act of 1879 for any portion of the debt which these certificates represented. Therefore the certificates which these holders already possessed, issued under the acts of 1871 and 1879, were retained by them as an evidence of that part of the debt

as to which Virginia had been released and as to which, under the act of 1882, as well as the act of 1879, they were to look to West Virginia for payment.

The act of 1892 was designed to fund all that part of the debt which Virginia had assumed that had not been funded under the act of 1882. The debt not funded under the act of 1882, then amounted to about $28,000,000, as we have seen. This act was passed in the light of the agreement between the representatives of the holders of this debt and the Virginia debt commission created two years prior to this act, and they proposed to surrender the said $28,000,000 not funded under the said act of 1882, for new bonds to be issued under the act of 1892, amounting to $19,000,000. So, under said act of 1892, the $28,000,000 in bonds made for all principal and interest were surrendered to Virginia and canceled, and in lieu thereof new bonds amounting to $19,000,000 were issued, as we have already seen; and the act expressly provides for the cancellation of all bonds of the state issued under the act of 1882, then held by the commissioners of the sinking fund, "as soon as at least $15,000,000 of new bonds shall have been issued and delivered pursuant to the provisions of this act"—meaning the act of 1892 (R., pp. 45, 46).

Thus we perceive that, by the very language of the act of 1892, which is filed as exhibit number 4 with plaintiff's bill, Virginia effected a complete settlement as to that part of the debt which she assumed, and that all bonds issued prior to 1892 were canceled, and a complete settlement of the debt as to her liability thereon effected by this act.

And the act then provides:

> "for all balances of the indebtedness, *constituting West Virginia's share of the old debt*, principal and interest,"

a certificate shall be issued, the act prescribing that the amount of the old debt represented by such certificate

> "is to be accounted for to the holders of this certificate by the state of West Virginia without recourse upon the commonwealth." (R., pp. 43, 44.)

Neither the act of 1882 nor the act of 1892 restricts the certificates to be issued to any part of the unfunded debt, but the act applies such

certificate to all balances of the old debt, constituting West Virginia's alleged share thereof. The acts of 1871 and of 1879 restricted the certificates to those issued under the act.

Can there be any doubt now that said act of 1892 constituted a final settlement between Virginia and the holders of the debt as to the part which it was agreed Virginia should assume, and operated to release her from all liability whatsoever upon "all balances" not funded under said act? Indeed, Virginia herself alleges in her bill, after referring to the acts of 1871, 1879, and 1882, as follows:

> "Until at length a final and satisfactory settlement of the portion of the debt of the original state which Virginia should assume and pay was definitely concluded by the act of February 20, 1892." (R., p. 11.)

What are we to understand by the use of the term "final and satisfactory settlement"? If such settlement was final, there could be no further settlement in reference to the debt. If such settlement was satisfactory, it must necessarily have been satisfactory to the parties concerned in it, and these parties were the commonwealth of Virginia and the holders of the debt.

It was final, because the only provision made for the payment of any part of the debt is that contained in the act of 1892, which was brought about by the creditors themselves, and the state of Virginia through her debt commission. This act provides a sinking fund for the principal, and provides for the payment of the interest on the bonds issued under it, as the same should become due and payable (R., p. 46). No other act exists and is in force in the state of Virginia relating to the debt, except the act of 1892.

Now, when Virginia has been released from all liability as to the unfunded part of said debt which is represented by the certificates mentioned in the bill, she passes a joint resolution to provide a means whereby West Virginia may be induced to assume and pay the said unfunded part of said debt (R., p. 47). In this joint resolution there is a long preamble, the last of which reads as follows:

> "Whereas the present state of Virginia has settled and adjusted to the entire satisfaction of her people and the creditors the liability assumed by her on account of

two-thirds of the debt of the original state; now, therefore, be it resolved," etc. (R., pp. 48, 49.)

This resolution created a commission composed of citizens of Virginia, which is,

> "authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia" (R., p. 49).

But the commission is not to proceed with its negotiation until satisfactory assurances have been received from a majority of the holders of said certificates (exclusive of those held by the state),

> "that they desire the said commission to enter into and undertake such negotiation, and will accept the amount so ascertained to be paid by the state of West Virginia in full settlement of the one-third of the debt of the original state of Virginia which has not been assumed by the present state of Virginia. But Virginia shall in no event enter into any negotiation hereunder except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof."

A majority of the holders of said certificates have requested this commission to proceed with its negotiations, and upon the understanding and agreement that Virginia is only bound for two-thirds of the debt, and that she has already provided for it.

Can there be any evidence more conclusive than this that Virginia is no longer liable for any part of the said debt represented by said certificates? She has been as effectually released therefrom as it is possible for positive legislation and the acts of the parties in conformity thereto to effect such a release.

This being in brief the status of the case as made out by the bill, West Virginia in her answer, in section 22 thereof, reciting these various acts, among other things, avers as follows:

> "And so respondent avers that the Commonwealth of Virginia has been wholly released from all liability on account of the said certificates and every part of them.

and has no legal or equitable interest in any claim based thereon, and that this suit was instituted and is being prosecuted by the said Commonwealth of Virginia solely as trustee for and on behalf of the holders of the said certificates, and not in her own right; and that she has agreed through her said commission with said creditors that she is to incur no expense on account of this action, and that the whole expense thereof is to be borne by the holders of said certificates, in whose behalf and for whose exclusive benefit the same was instituted and is now being prosecuted" (R., pp. 163, 164.)

Everything that Virginia did toward securing an exoneration from all liability as to the unfunded part of said debt, (she alleging that two-thirds of the original debt is her just proportion and which she has assumed and which the creditors have accepted as her just proportion,) appears on the face of the bill and its exhibits; and the allegation of the answer alleging this release must be taken as true for the purposes of this suit, because Virginia has not controverted the truth thereof by any replication to said answer. It is well settled that, in the absence of a statute or rule of court to the contrary, where a cause in equity is set down for hearing on bill and answer alone, the general rule is that the answer is to be considered as true in all its allegations, whether responsive or not, on the ground that the complainant's failure to put in issue by replication the facts alleged in the answer would preclude the defendant from proving them.

Gettings v. *Burch*, 9 Cranch 372 (3 L. Ed. 763).

Leeds v *Marine Insurance Co.*, 2 Wheat. 380 (4 L. Ed. 266).

Peirce v. *West*, 19 Fed. Cas. No. 10, 909.

United States v. *Scott*, 26 Fed. Cas. No. 16, 242.

Reynolds v. *Bank*, 112 U. S. 405 (28 L. Ed. 733).

Bank v. *Manchester*, 128 U. S. 244 (32 L. Ed. 425).

In re Sandford Fork, etc., Co., 160 U. S. 247 (40 L. Ed. 414).

United States v. *Freight Association*, 7 C. A. 15 (24 L. R. A. 74).

Atlantic Trust Co. v. *Chapman*, 145 Fed. 820 (76 C. C. A. 396).

We have here cited some of the decisions of the federal courts in support of the proposition above announced; but all the state courts that have passed on the subject hold the same doctrine, and there is no break in all the authorities. This is the doctrine of the courts of Virginia.

Jones v. *Mason*, 5 Rand. 577 (6 Am. Dec. 161).

Kennedy v. *Baylor*, 1 Wash. 162.

Pickett v. *Chilton*, 5 Munf. 467.

Blanton v. *Brackett*, 5 Call 232.

Cock v. *Minor*, 25 Gratt. 246.

But it is needless to cite authorities here, as there is a wilderness of them in support of the doctrine that all parts of an answer unreplied to must be taken as true.

Accord and Satisfaction Created Between Virginia and Her Creditors as to the Unfunded (One-third) Portion of Her Debt.

The acceptance by her creditors of the several acts of legislation of Virginia, hereinbefore cited, effected an agreement between them, whereby Virginia was not to be held liable for the payment of the unfunded debt, nor to suit thereon; which unfunded debt is one-third of the whole original debt, and which unfunded debt is evidenced as to amount by the certificates issued by Virginia. By this agreement the holders of this unfunded debt, who are also the holders of these certificates, look to West Virginia for payment thereof without recourse upon Virginia. Thus, Virginia was relieved of all liability for this one-third of her debt not funded nor assumed by her, and there was created between her and her creditors, as to the unfunded one-third of the debt upon which the certificates were issued, an *accord and satisfaction*.

If the acts of the legislature of Virginia, the provisions whereof were accepted and acted upon by her creditors, show anything at all, they show that these creditors accepted these certificates with the express agreement that Virginia was not to be liable to them for any part of the debt unfunded and which was represented by said certificates. Before considering the law applying to this feature of the case, we call the Court's attention to certain incontrovertible facts appearing in the record.

By the act of 1871, as we have seen, the bonds funded under said act were to be surrendered to Virginia and canceled, but to be retained by her nevertheless *in trust* for the holders of the certificates representing the unfunded part. The rate of the interest prescribed to be paid upon the new bonds was at the rate of six per cent per annum.

By the act of 1879, which provided for the funding of the entire debt (R., p. 23), all bonds surrendered were likewise to be canceled, and the rate of interest changed from six per cent to three per cent per annum for ten years, four per cent for twenty years, and five per cent for ten years (R., pp. 21, 22); and all certificates issued under that act were to be accepted by the holders *without recourse upon Virginia.*

Under the act of 1882, after a full statement of the debt and fixing Virginia's proportion thereof, a large reduction was obtained from the principal of the debt. The rate of interest was again changed from that fixed by the act of 1879, and fixed at the rate of three per cent per annum. Under the act of 1879, the interest was payable in the cities of Richmond, New York or London (R., pp. 21, 22), while under the act of 1882 the interest was payable at the office of the treasurer of Richmond, Virginia. There was therefore a change in the place of the payment of the interest.

By the act of 1892, Virginia obtained a reduction of the principal and a reduction of the rate of interest to two per cent for the first ten years and three per cent for the remaining ninety years, and the place of the payment of the interest to be at Richmond, New York and London, or either place, might be designated by the state (R., p. 40).

These changes in the contract as to the rates of interest, the places where the interest was payable, the reduction of the amount of principal, and the extension of time for the payment of the debt, the adjustment in this manner being to the satisfaction of the creditors before the maturity of the debt, constitute a valid consideration for an accord and satisfaction between Virginia and the holders of the old debt.

In *Goodnow* v. *Smith*, 35 Mass. 414, the action was assumpsit on a joint and several promissory note made by the defendants, Noah Smith and Joseph H. Adams, dated February 26, 1827, and payable one-half in one year and one-half in two years from April then ensuing. Adams defaulted. Smith pleaded the general issue. The defense was that in the autumn of 1827, before either of the installments of the note became due, it was agreed between the plaintiff and Smith that if Smith would then pay one-half of the note and take of the plaintiff at par a note for $21.14 which he held against one Willis the plaintiff would exonerate and discharge Smith from payment of the other half of this note, and that Smith in pursuance of this agreement then paid one-half of the principal and the interest on the note and took Willis' note at par value and endorsed by the plaintiff without recourse. The court sustained this defense. The syllabus of the case reads as follows:

> "In an action upon the joint and several promissory note of A. and S., brought against both promisors, A. was defaulted, and S. set up, as a defense, an agreement made between him and the plaintiff, before the note became due, by the terms of which the plaintiff exonerated and discharged S. from the payment of one-half of the note, upon his then paying the other half and receiving of the plaintiff, at par, a note of a third person endorsed without recourse to the plaintiff. It was *held*, that the agreement was founded on a good and sufficient consideration; and that it was a good defense to the action so far as respected S.; but that under St. 1834, c. 189 (Revised Stat., c. 100, §7), the plaintiff was entitled to judgment against A."

The court in its opinion said:

> "This case turns upon the distinction between a

> technical release and a covenant not to sue one of two joint obligors or promisors. The distinction is, that a release to one of two joint and several obligors discharges both, whereas a covenant with one not to sue him is not to be construed as a release so as to discharge the other obligor. This distinction is well founded on principle, and is supported by all the authorities."

The court reviews the authorities, and holds that the plaintiff could not maintain any action against Smith.

In *Chicago, Milwaukee & St. Paul Railroad Co.* v. *Clark*, 178 U. S. 353 (44 L. Ed. 1099), points two and three of the syllabus are as follows:

> "The rule that payment of a less sum in satisfaction of a larger sum is not binding for want of consideration only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of a part of it, and the rule itself is considered so far with disfavor as to be confined strictly to the cases within it.
>
> "The payment of a specified sum conceded to be due, but including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole sum where the aggregate amount is in dispute."

An examination of the opinion in this case, delivered by the late Chief Justice Fuller, discloses a very careful consideration of the rule, an examination of many authorities, and the adoption of the principle that any (even the most insufficient) consideration is valid to support an accord and satisfaction based upon the payment of a less sum in discharge of a greater. The learned justice also says that in some of the states the old common-law rule has been changed by statute: the states mentioned as having altered the rule are Alabama, Georgia, Maine, Tennessee, and Virginia.

In *Hutton* v. *Stoddart*, 83 Ind. 539, the syllabus reads as follows:

> "A. employed B. as a traveling salesman at a salary

of $1,200 per annum, and becoming dissatisfied with him sent him a check for $400 in payment of the last half of the salary before the expiration of the year, with instructions to return it if not satisfactory. B. retained the check, collected the money upon it, and assigned the residue of the salary, for which suit was brought.

"*Held*, that the action cannot be maintained; that the retention of the money was an acceptance of A.'s proposition, and operated as a complete satisfaction of the claim.

"The payment of a part of a debt in satisfaction of the whole, if made before the debt is due, is a complete satisfaction of the whole debt.

"A dispute about a claim is sufficient to maintain a compromise, and thus render the payment of a part of a debt a complete satisfaction of the whole debt."

In *Allison* v. *Abendroth*, 108 N. Y. 470 (15 N. E. 606), the court in the course of its opinion, discussing the well settled common-law doctrine that a promise by a debtor to pay part of an admitted debt, followed by payment of such part, is not a good accord and satisfaction of the unpaid part, said:

"This rule of the common law, as was said by Nelson, J., in *Kellogg* v. *Richards*, 14 Wend. 117, is 'technical, and not very well supported in reason'; but it has been steadily maintained by the courts in cases coming strictly within it. But it is held that where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be a legal possibility of benefit, to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law to which we have adverted has no application. Upon this distinction the cases rest which hold that the acceptance by the creditor, in discharge of the debt, of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction; as, for example, a peppercorn for a thousand pounds (*Pinnel's Case, arguendo*), or a negotiable instrument binding the debtor or a third person for a smaller sum (*Curlewis* v. *Clark*, 3 Exch.

375). Following the same principle, it is held that, when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction, if so agreed. The case of accepting the sole liability of one of two joint debtors or co-partners in satisfaction of the joint or co-partnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors 'may be more beneficial than the joint liability of both, either in respect to the solvency of the parties, or the convenience of the remedy.' *Thompson* v. *Percival*, 6 Barn. & Adol. 925. In perfect accord with this principle is the recent case in this court of *Luddington* v. *Bell*, 77 N. Y. 138, in which it was held that the acceptance by a creditor of the individual note of one of the members of a co-partnership, after dissolution, for a portion of the co-partnership debt, was a good consideration for the creditor's agreement to discharge the maker from further liability."

In *Silvers and Brittin* v. *Reynolds*, 17 N. J. L. 275, judgment was entered against two defendants. Silvers and Brittin, by confession on warrant of attorney, upon the joint and several notes to the plaintiff for $2,400, dated May 14, 1835, as collateral security for three other notes of theirs to the plaintiff of $800 each, payable successively in August, 1836, December, 1836, and January, 1837, with liberty to enter the judgment if either of these notes was not paid at maturity. Each defendant obtained a rule on the plaintiff to show cause why this judgment as to himself should not be set aside, or opened so as to allow him to plead. The court in the course of its opinion, in making the rule absolute, said:

"What is now shown by the affidavits, is not denied, that prior to the entry of the judgment, the plaintiff had agreed with the defendants, to take Silvers alone for the debt, and discharge Brittin from it, if he (Brittin) would pay down five hundred dollars toward it; in pursuance of which agreement, Brittin actually paid him the five hundred dollars, and the plaintiff immediately tore Brittin's name from each of the three notes, and delivered up to him the signatures; after which the

plaintiff applied for judgment against him. It is said that five hundred dollars cannot be a satisfaction for eight hundred dollarrs, in law; that an agreement to accept a less in satisfaction of a greater sum of money, is void on the face of it, and can never be enforced without a technical release. It is true that the law will not enforce an unexecuted agreement of that kind; but where such an agreement has been executed, as by giving a release of the larger sum, it is then valid and available. Now this case is as strong as that of a release. It was an executed agreement, for by voluntarily tearing the signatures from the notes, it extinguished them forever, as effectually as a release of them; and after this, it was an imposition on the court to apply for judgment against Brittin."

In *Jones* v. *Perkins*, 29 Miss. 139 (64 Am. Dec. 136), the syllabus is self-explanatory. The first two points are as follows:

"Agreement to accept less sum, or actual acceptance at the place of payment by the terms of the original contract of a less sum, than the amount due is no defense to the debtor. It is, however, said that this rule is entirely technical, and not very well supported by reasons; hence it requires but slight consideration to support such agreements.

"While general rule is that payment of less sum than the amount due at the place of payment will not discharge the contract, yet if the payment is made, or to be made, at a different place from that appointed by the contract, this is a sufficient consideration for an agreement to accept a less sum."

In *Sonnenberg* v. *Riedel*, 16 Minn. 72, the action was tried before a referee, who found that on January 12, 1867, the defendant owed the plaintiff $300 and some accrued interest, which would become due on the 1st of March, 1867; that on said 12th day of January the defendant paid the plaintiff and the plaintiff received the sum of $100 in full of said debt; that the plaintiff's motive in so doing was compassion for defendant's misfortune in having shortly before been burnt out. The referee held that the settlement was binding and a bar to the action. From the action of the court confirming the find-

ing of the referee the plaintiff appealed, and the action of the court below was affirmed. The syllabus of the case is as follows:

> "The payment and acceptance of a smaller sum, in full of a debt before it becomes due, discharges the debt."

In *Brooks* v. *White*, 43 Mass. 283, the point of the syllabus pertinent here is as follows:

> "If a debtor gives, and the creditor receives, in full satisfaction of the debt, the note of a third person for a smaller sum than the amount of the debt, it is a good accord and satisfaction to bar a suit by the creditor to recover the balance of the debt. So if the creditor receives a less sum than is his due, in satisfaction of the whole, before the day of payment."

In *McKenzie* v. *Culberth*, 66 N. C. 431, the question presented was, whether the payment by the debtor and an acceptance by the creditor of a less sum than is due upon a bond, as a payment of the whole, is a discharge of the obligation so as to preclude the creditor from recovering the remainder of the bond. The following are the points decided:

> "1. The principle is too well established and too long acquiesced in to be disturbed, that an agreement by a creditor to receive a part in discharge of the whole of a debt due him by single bill, is without consideration and therefore void.
>
> "2. To this rule there are exceptions, as if:
>
> 1. A less sum is agreed upon and received before the day of payment.
> 2. Or at a different place.
> 3. Or money's worth.
> 4. Or where a general composition is agreed upon."

The agreement of Virginia with her creditors comes within the exceptions noted above.

In *Fenwick* v. *Phillips*, 60 Ky. 87, the point in the syllabus applicable here reads as follows:

> "The doctrine is well settled, that the payment of a less sum is not a good satisfaction, unless it be made

before the money was due, or at a different place from that at which it was payable."

In *Schweider* v. *Lang*, 29 Minn. 254 (43 Am. Rep. 202), the action was upon a promissory note. The defense was what is known as an accord executory; that is to say, an agreement upon the sum to be paid and received at a future day in satisfaction of the note, a part of the agreement being that the note was to be paid for the lesser sum agreed upon at a future day before the maturity of the note. The holder refused to perform the agreement, and transferred the note, and an action was brought against the assignor for damages for breach of the agreement. The syllabus is as follows:

"An oral agreement by the maker of a note to pay and by the holder to accept, before maturity, a less sum than the note calls for, in full satisfaction, is valid, and the holder is liable in damages for a breach of it."

In *Bowker* v. *Childs*, 85 Mass. 434, the point in the syllabus is as follows:

"Payment of less than the face of several promissory notes, a portion of which are not due, is a good satisfaction of all of them, if upon the receipt and acceptance of the money by the holder the notes are given up to the maker."

In *Smith* v. *Brown*, 10 N. C. 580, the second point of the syllabus reads as follows:

"If an obligor pay a less sum than is due, either before the day specified or at another place than is limited by the condition, and the obligee receive it, this is a good satisfaction."

Surrender and Cancellation of the Old Bonds.

Virginia, in each of the four acts hereinbefore considered, in each of which she dealt as an entirety with the subject of her debt, took the precaution to provide for a surrender of all the outstanding bonds which Virginia had ever issued under the acts of 1871, 1879, and 1882, and for the cancellation of these bonds as evidences of indebtedness; and the act of 1892 effects the same result. Why did she

stipulate that these old bonds should be surrendered unless it was to get into her posesssion the evidence of her old debt, which it was her purpose, by these acts, with the agreement with the holders of the debt, that she was discharging and paying off these bonds by the course pursued by her under these various funding acts? The authorities attach great importance to the surrender of an instrument evidencing a debt, when it is sought to show the discharge of such debt by the party against whom it is sought to enforce the unpaid or unsatisfied part. The attention of the Court is called to the following authorities:

In *Murray and Mason* v. *Snow*, 37 Ia. 410, the plaintiffs brought an action against the defendant upon an account. Upon the defendant pleading a settlement of the account by note, the plaintiffs then amended their petition, declaring upon the note, and to the petition as amended the defendant pleaded that the note had been fully paid off, satisfied and surrendered. The amount paid for the surrender of the note was fifty per cent in full satisfaction thereof. The court, in holding that the action could not be maintained, in the course of its opinion said:

> "It appearing, therefore, from the pleadings and the findings of fact, that the plaintiffs and the other creditors of the defendant who was in insolvent circumstances, and without any fraud on his part, agreed to accept fifty cents on the dollar in full satisfaction for their respective claims, and that the plaintiffs had been paid such composition in full, and had surrendered the note of the defendant held by them, pursuant to their agreement, they cannot maintain this action. The judgment should have been for the defendant."

In *Draper* v. *Hitt*, 43 Vt. 439 (5 Am. Rep. 292), the first point of the syllabus is as follows:

> "The acceptance of a note of $40 in satisfaction of a note of $60, and the simultaneous surrender of the larger note, is a full discharge thereof."

In *Ellsworth* v. *Fogg*, 35 Vt. 355, the second point of the syllabus reads as follows:

> "The acceptance by the holder of a promissory note

of part of the amount due upon it, in satisfaction and discharge of the whole note, and the surrender of the note by the holder to the maker to be canceled, is a full discharge of the note, and no action can be maintained for the unpaid portion."

The court, in the course of its opinion in this case, said:

"We think the surrender of the notes by the owner to the maker may well be put upon the same ground as a release,—as being an act of the highest significance and clearest import to show the deliberate and well understood agreement of the parties. It is their agreement executed,—a release in practical operation. It is free from liability to mistake or fraud. The deliberate surrender of notes by the owner to the maker, to be canceled, is an act which no man of prudence, or of the least knowledge of business, would do, unless he intended to discharge the debt. A release, as well as the surrender of notes, may be procured by deceit and fraud,—but when they are made according to the intent of the parties, they should be sustained."

Promise of a Debtor to do Some Act in the Future is Sufficient to Create an Accord and Satisfaction Without Performance by the Debtor.

By the act of 1879 Virginia relieved herself from the conditional liability created under the act of 1871 by her promise to her creditors and their acceptance thereof, to negotiate, or to aid the holders of the certificates issued under the acts of 1871 and 1879 in negotiating with West Virginia for an amicable settlement for the payment of the unfunded part of her debt, represented by the certificates. Virginia, when she made this promise, knew that its performance on her part was not a condition precedent to the validity of the accord and satisfaction sought by the said act to be created between her and her creditors as to the old debt; because the acceptance of the provisions of the act, the funding of the old debt under it, the surrender of the old bonds, and the changing of the rate of interest constituted an accord and satisfaction independently of this promise of Virginia to negotiate or aid the creditors in negotiating an amicable settle-

ment with West Virginia for the payment of the unfunded part of the debt.

In *Smith* v. *Elrod,* 122 Ala. 269 (24 So. 994), the court in its opinion said:

> "While it is a general rule that an accord, in order to operate as a discharge of a debt, must be executed, yet it is well settled that a creditor may accept the mere promise of the debtor to perform some act in the future in satisfaction of the debt; and where such is the case the satisfaction is good, and the debt extinguished without performance. 1 Am. & Eng. Enc. Law (2d Ed.) 423; *Knowles* v. *Knowles,* 128 Ill. 110 (21 N. E. 196); *Ports.* v. *Polk Co.,* 80 Iowa 401 (45 N. W. 775); *Averill* v. *Wood,* 78 Mich. 342 (44 N. W. 381); *Railroad Co.* v. *Forrest,* 128 N. Y. 83 (28 N. E. 137); *Babcock* v. *Hawkins,* 23 Vt. 561. That the plaintiff accepted the delivery of the sawmill machinery to him, and the defendant's promise to deliver the 20,000 shingles by March 1, 1896, and to perform the other stipulations in full satisfaction of the notes and accounts, and that defendant made the delivery and promises with this understanding, is, we think, made manifest by the undisputed evidence that plaintiff told defendant he would instruct his wife to deliver the notes to him, and he could call on her at any time and get them, and that one of them was in fact surrendered to defendant by the wife. The accord was executed, in so far as its execution was necessary to the satisfaction of the debt, by the delivery of the machinery and the promise to perform the other acts, and was a complete bar to any action on either the notes or the accounts, unless rescinded for sufficient cause."

Virginia Had the Right Under Her Own Laws to Discharge Herself from Liability by Assuming Two-Thirds of the Old Debt, if Done with the Consent of Her Creditors (and it Was so Done), Without Impairing Their Rights (if Any They Had) Against West Virginia for the Residue.

As shown by her acts of legislation, Virginia treated the liability of West Virginia as direct to the creditors, and not as an obligation enuring to her. She thus dealt with the debt under these acts as if she were liable for a certain proportion thereof and West Virginia for the residue. Without consulting West Virginia, she and the creditors arbitrarily fixed her part at two-thirds, and West Virginia's at one-third. In all these acts, beginning with that of 1871, Virginia assumed that West Virginia was liable, like herself, directly to the holders of the debt; and this being so, that Virginia had the right, under her own laws, to agree with her creditors as to the amount they would exact from her; and this they did, as we have already shown.

Under the laws of Virginia, upon this theory of the case, the creditors might have dealt with the debt with Virginia alone, excluding West Virginia from the negotiations; and after a settlement with Virginia as to her part, hold West Virginia liable (if she be liable at all) for the other part. Such a course was duly authorized under the statute law of Virginia, in subordination to which the negotiations of Virginia with the holders of the debt were carried on.

In 1866-7 Virginia adopted the following provision of law, which appears in the present Code as section 2856:

> "A creditor may compound or compromise with any joint contractor or co-obligor, and release him from all liability on the contract or obligation, without impairing the contract or obligation as to the other joint contractor or co-obligors."

In *Yuille* v. *Wimbish*, 77 Va. 308, this statute was construed and held to be constitutional. It was contended that as to existing contracts it impairs their obligation and is therefore unconstitutional. Overruling this objection, the court in the opinion says:

> "It preserves all rights, and only provides an express.

direct and ready mode of doing, by and between joint contractors, what it was not unlawful to do before the statute was enacted and was done by round-about and difficult indirection. It only removes technical difficulties out of the way of compromise and settlement.

"An English statute cited in *Dewolf* v. *Lindsell*, L. R. 5, Eq. Cas. 209, bears close resemblance to our Virginia statute in its purpose and effect, and the courts expressly held that it would apply to existing contracts."

There was inserted in the Code of Virginia of 1887 as section 2858 the following:

"Part performance of an obligation, promise or undertaking, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise or undertaking."

The law in Virginia existing prior to that enactment is clearly stated, after an examination of the authorities, in *Seymour* v. *Goodrich*, 80 Va. 303. The court in discussing the technical rule which, at common law, forbids the discharge of a debt by the payment of a smaller sum, said:

"But this rule, being highly technical in its character, seemingly unjust, and often oppressive in its operation, has been gradually falling into disfavor; and the courts have therefore not only confined its operation strictly within its own narrow limits, but have seized upon every possible opportunity to evade its application. As a consequence, it has been generally, if not universally, held that where any new element entered into the agreement of compromise—as where an earlier day is fixed for the payment, or a different place selected therefor, or where the payment is made in some other thing than what was originally contracted for, *e. g.*, a chattel, or personal services, it will amount to a satisfaction of the whole debt, if the parties so agree. *Bliss* v. *Charter*, 5 Day 359; *Gaffney* v. *Chapman*, 4 Roberts 275; *Watkinson* v. *Ingleby*, 5 John. 386; *Bowker* v. *Harris*, 30 Vt. 424; *Bull* v. *Bull*, 43 Conn. 455; *Perkins* v. *Lock-*

wood, 100 Mass. 249. And in *Goddard* v. *O'Brien,* reported in the 21st Vol. Am. Law Reg. (N. S.) 638, S. C. L. R., 9 Q. B. Div. 37, the court carried this distinction so far as to hold that an acceptance of a check for $100, payable on demand, was a good accord and satisfaction of an indebtedness of £125 7s 9d, then due and payable, for the reason that the check was a negotiable instrument, thus holding, in effect, that the supposed advantage to be derived from the negotiability of the check for a part of the indebtedness, was a sufficient consideration for a relinquishment of the remainder. *Foakes* v. *Beer,* L. R. 9 App. Cases 605."

Virginia Has No Such Interest in Any Part of the Unfunded Debt Held by Third Parties, Which It Is Claimed West Virginia Should Pay, as to Enable Her to Enforce Payment by This Suit.

If Virginia has any suable interest in the unfunded debt, what constitutes that interest? Is it to ascertain the amount of her public debt existing on January 1, 1861? No; because Virginia had already determined this by her act of 1882, to which the holders of the debt assented, and upon terms of that act and the act of 1892 they agreed to accept and did accept new bonds from Virginia for the share of the debt which it was agreed Virginia should pay. Virginia was thereby relieved from liability as to the residue. (See exhibits 3 and 4 with the bill, record pp. 26-47.)

To the action of Virginia in ascertaining the amount of the debt, as shown by her act of 1882, no objection has ever been made, either by West Virginia or any of Virginia's creditors. What controversy, then, between the two states exists as to this matter? There is none. Does Virginia's interest as to the debt consist in ascertaining the proportion thereof which she ought to assume and be liable for? No; because, as we have shown and as appears from the bill itself and its exhibits, this has already been done by agreement between Virginia and the owners of the debt, and that, too, to their mutual satisfaction. There is no controversy then between the plaintiff and defendant as to this feature of the case.

Is Virginia interested in ascertaining West Virginia's equitable proportion of said debt, if such there be? No; because Virginia, as we have seen, is not liable to her creditors for such part, and because she is to receive nothing in this suit on account of such part. No controversy, therefore, exists between the two states as to what is West Virginia's just or equitable proportion of said debt, if she be liable at all, inasmuch as it is neither due nor payable to Virginia, but to the holders of the unfunded part of said debt.

If a controversy exists with reference to what Virginia has done with her creditors touching said debt, upon what is such controversy based? Not under the act of 1871; because while she assumed a conditional liability under such act as to the unfunded part, she has been entirely released as to the certificates issued thereunder therefor by virtue of the acts of 1882 and 1892, whereby the holders of said debt agree to look to West Virginia for payment thereof without recourse upon Virginia. It is not by the form of the certificates issued under the act of 1871 that the holders thereof are to look to West Virginia for their payment, but by the very terms of the acts of 1882 and 1892, which the creditors themselves accepted.

There is no controversy created by the act of 1879; because the certificates issued thereunder representing the portion of the debt not funded under the act of 1871, were accepted under the express agreement that the creditors were to be without recourse upon Virginia.

Inasmuch as Virginia is, by express agreement with her creditors, not liable for the unfunded portion of her debt, represented by the certificates issued by her, and for payment of which portion she sues in this suit; and inasmuch as any liability for such portion of the debt as may attach to West Virginia, is to the holders of the certificates, and not to Virginia, Virginia has no such interest in this suit as enables her to enforce payment of said unfunded part of the debt.

Party Without Interest Cannot Maintain an Action.

The principle is well settled that a party cannot maintain a suit when another party is the real beneficiary in any judgment or decree that may be obtained in such suit.

An agent or other like representative cannot bring suit in his own name.

Bissell v. *Spencer*, 9 Conn. 267 (23 Am. Dec. 336).
Gilmore v. *Pope*, 5 Mass. 491.
Gunn v. *Contrie*, 10 Johns. (N. Y.) 387.
The State v. *New London*, 22 Conn. 170.
Townsend v. *Hoyle*, 20 Conn. 6.
People v. *Ingersoll*, 58 N. Y. 1 (17 Am. Rep. 178).
Morris Canal ads. *The State*, 14 N. J. L. 411.
People v. *Booth*, 32 N. Y. 397.
Wilson v. *Shively*, 10 Or. 267.
State v. *Bradish*, 34 Vt. 420.

In *Bissell* v. *Spencer*, 9 Conn. 267, cited above, an action of debt was brought by a state treasurer to enforce the payment of certain judgments rendered for fines against the testator of the defendant, who was sued as his personal representative. The fines were directed to be paid "to the treasurer of the State of Connecticut for the use of the treasury of said State." The declaration was demurred to, on the ground that the state treasurer had no interest in the sum sought to be recovered. The court below overruled the demurrer, and the Supreme Court of Connecticut, reversing the court below, in the course of its opinion said:

> "A person authorized to sue in a court of law must have a legal interest in the subject of the suit. If he is the servant or agent only of the creditor, the action cannot be sustained in his name: 1 Chit. Pl. 3, 5. That a person who has not the legal interest cannot maintain *indebitatus assumpsit*, is too clear to be disputed: 6 Conn. 312; and that even a promise by simple contract to the treasurer of a corporation is, by legal construction, a promise to his principal. The point has frequently been decided: *Pigott* v. *Thompson*, 3 Bos. & Pul. 147; *Gilmore* v. *Pope*, 5 Mass. 491; *Bainbridge* v. *Downie*, 6 *Id.* 253, 258; *Gunn* v. *Cantine*, 10 Johns. 387."

In *Gunn v. Cantine*, 10 Johns. (N. Y.) 387, it appears that the action was *assumpsit* for money had and received for the use of the

plaintiff. The plaintiff was the holder of a note which was turned over to him by the owner under a power of attorney authorizing him to sue and collect the same. The suit was brought in his own name. The Supreme Court of New York, in holding that the action could not be maintained, says:

> "It appears affirmatively, from the case, that the plaintiff had no beneficial interest in the money collected. He was a mere attorney employed by Simmons to collect this debt; and there was no express promise by the defendant to pay the money collected to the plaintiff."

The State v. *New London*, 22 Conn. 163, was an action of debt brought by the State of Connecticut against the town of New London to recover the sum of $1500 as a penalty for a violation of the statute requiring towns to appoint assessors and to cause them to be sworn. It was contended that the State could not maintain this action, but that it should be brought in the name of the financial agents of the State as the collectors of the State's revenue. The court, in overruling this objection, in its opinion said:

> "The penalties, incurred by a violation of this statute, are for the use of the treasury of the state, and the state alone has the legal interest in them, and not its officers. These officers are but agents, and cannot sue in their own names, unless empowered to do so by some statute. *Spencer* v. *Huntington*, 6 Conn. 312; *Bissell* v. *Spencer*, 9 *Id.* 267."

In *Morris Canal* ads. *The State*, 14 N. J. L. 411, the question arose whether or not the State could be made plaintiff in a writ of *certiorari*. The court, in discussing the question, in the course of its opinion said:

> "But, I apprehend, the state is never properly plaintiff in *certiorari*, where the object of the writ is to relieve individuals in matters affecting their private rights; unless the proceeding complained of has been instituted and carried on, by the state, in its corporate and political character, and for political or municipal purposes—in other words, the name of the state cannot be used, as plaintiff in *certiorari;* except in those cases

in which the individual, for whose benefit, or relief, it is sued out, cannot, upon legal principles, be himself the plaintiff; or where the state or the whole community have some rights, or interests, in the subject matter; not speculative or political, but direct and positive rights and interests, which are to be affected one way or the other. This will be found to embrace an extensive class of cases, relating to the public peace, the public revenue, the public defense, common and public highways, and many other matters of general interest and concern. In short, wherever the authority, or the interest, of the state, in the prosecution of any of the great purposes of government, comes into conflict with individual rights, and the state, either in its corporate name, or by its appropriate agents, is the actor, in carrying into execution those purposes; *then* the name of the state may be properly used by an individual complaining of, and seeking to be relieved against *its* proceedings. In such cases, the state yields a tacit consent to be made plaintiff in *certiorari* where that is the proper remedy, for the purpose of affording the citizen an opportunity of being heard in this court, and having the error corrected, if any has been committed."

In *Wilson* v. *Shively*, 10 Or. 267, the object of the suit was to have decreed the legal title held by the defendant to be in the relators—to have the state patent to certain tide lands alleged to have been procured by fraudulent representations by Shively to be canceled and annulled, and to compel a conveyance of the title held under the patent by the defendant Shively to the relators. In holding that this suit could not be maintained by the state, the court in its opinion said:

"And the question which confronts us at the threshold of our inquiry, is the right of the relators to carry on a litigation in the name of the state for the object sought by the suit, and the authority of the court, in a case so constituted, to adjudicate upon it. For it will hardly be asserted, if the subject matter of litigation concerns the rights of private parties only and exclusively, and the state has no direct interest in

> the prosecution or result of the suit, that state interference in such controversies ought not to be countenanced, or tolerated, either directly or upon the relation of private parties."

The court then considers the relation the state bears to the suit, or rather what interest it has in it, and, determining that the state has no interest in the subject matter of litigation, the court dismisses the action. The concluding sentence of the opinion is as follows:

> "It seems to us in facts thus constituted, in their relation of the state to them, and in consequences to be apprehended from such state interference, are objections of too serious a character to maintain this suit."

In *State* v. *Bardish*, 34 Vt. 419, the action was trespass for carrying away a quantity of tools and implements, the property of the State of Vermont. It was contended that the action could not be maintained by the state, but the court, in overruling this contention, in its opinion says:

> "It is evident both upon common law principles and upon inference from the legislation on this subject, that where there is no statutory provision to the contrary, actions by the state or for the benefit of the state are to be brought in the name of the state, in cases where, upon common-law principles, the legal interest in the subject matter is in the state."

In *Lynch* v. *United States*, 13 Okla. 142 (73 Pac. 1095), the action was brought by the United States to set aside a sale of land and cancel a patent issued by the United States. The main question discussed and decided in that case was whether or not the United States as plaintiff had such interest in the suit as authorized its maintainance. In discussing the question, the court in its opinion says:

> "The United States stands in no different relation as a suitor than any individual. When the government comes into a court to submit a question to judicial determination, she is not acting in her capacity as a sovereign, but as a litigant, claiming the same rights, and bound by the same rules, as any of her citizens under similar circumstances. This was expressly held

in *United States* v. *Bank of Metropolis*, 15 Pet. 377 (10 L. Ed. 444); *Brent* v. *Bank of Washington*, 10 Pet. 596 (9 L. Ed. 547); *United States* v. *Hughes*, 11 How. 552 (L. Ed. 809); *United States* v. *Throckmorton*, 98 U. S. 61 (25 L. Ed. 93); *United States* v. *Minor*, 114 U. S. 233 (5 Sup. Ct. 836, 29 L. Ed. 110). Hence, in determining whether the petition alleges such equities in the United States as against the defendants as will warrant the court in cancelling a patent, we must look to the general rule of chancery pleading in equity cases, and in determining these rules we need look only to the decisions of the Supreme Court of the United States, where every phase of the subject has been discussed and determined."

Classifying the cases in which a suit of this sort may be maintained by the government, and disposing of the second and third classes, holding that the suit did not come under these classes, and which it is not material to consider here, the court comes to the first class, "Where, the government being the only party interested, the patent is charged to have been obtained by fraud," and in its opinion regarding this class the Court says:

"In this class of cases a court of equity will furnish relief where the United States has been defrauded, her interest prejudiced, or to protect the general public from wrongful imposition. But if the United States has not been injured, and will not be benefited by the rescission of the contract and cancellation of the patent, the court will not grant any relief. *Ming* v. *Woolfolk*, 116 U. S. 599 (6 Sup. Ct. 489, 29 L. Ed. 740).

"This case must be tried and tested by the rule stated in the *San Jacinto Tin Co.* case, *supra*, where it was said that the United States can no more sustain an action to cancel a patent than can a private individual, if it is apparent that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use, or that there is no obligation on the part of the United States to the public. It clearly appears from the petition that the only persons who will be benefited from this proceeding are

> the town site occupants who are residing on the land, and by their failure to make the proper town site application and tender the money for the land, and follow the same to a final disposition, they have forfeited all their rights under the law, and it is well settled that equity will not aid one who has had a full and complete remedy at law, and has failed to avail himself of such remedy."

In *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273 (31 L. Ed. 747), a suit brought by the United States to set aside and annul a patent for land issued in its name on the ground that it was obtained by fraud, the Court in its opinion said:

> "But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

In *State* v. *Warner Valley Stock Co.*, 48 Or. 378 (86 Pac. 780), the suit was brought by the state, through its attorney general, for the cancellation of a patent for swamp land given by the state. The case turned on the question whether or not the complaint showed on

its face that the state has such interest in the controversy as to authorize it to maintain the suit. In the course of its opinion the court says:

> "Unless the plaintiff has some interest in the land in controversy, it has no right to maintain this suit."

In *City of Atchison* v. *State*, 34 Kan. 379, the syllabus of the case, as found in 8 Pac. 367, sufficiently states the matter in controversy and the point decided, without making any further explanation:

> "Where a city, without authority of law, caused a tax to be levied and extended upon the tax-roll for the purpose of creating a fund with which to pay certain bonds theretofore issued and delivered in payment of bridges that had been built therein, and after the tax-roll had come to the hands of the county treasurer for the collection of the taxes a number of the tax-payers of the city voluntarily paid the illegal tax thus levied: *held*, that the public has no such interest in the money thus paid as will authorize the state to interfere and to maintain an action in the name of the state, enjoining the treasurer from paying out the money so received by him, and from disbursing it in accordance with the will of those who paid the same."

In *People* v. *Stratton*, 25 Cal. 242, the first point of the syllabus is as follows:

> "The attorney general may file an information in the nature of a bill in chancery, to annul a patent for lands granted by this state to an individual, in a case where the matter involved in the suit immediately concerns the rights and interests of the state."

The third point of the syllabus in this case is as follows:

> "If the state has no interest in the subject matter, an information on the relation of the attorney general, on behalf of the state, to annul a patent cannot be sustained."

In the case of *Kansas* v. *United States*, 204 U. S. 331 (51 L. Ed. 510), the bill was filed by the attorney general of Kansas on behalf of the state as trustee for the Missouri, Kansas & Texas Railway Co. of certain lands in the Indian Territory alleged to have been granted

to the state for the benefit of the railway company. The case was dismissed for want of jurisdiction. The Court, in the course of its opinion, said:

> "In our opinion it appears upon the face of the bill that the state of Kansas is only nominally a party, and that the real party in interest is the railroad company. Section 3 provides that patents should be issued not to the state, but to the company direct, which made the state nothing but a mere conduit for the passage of title. And this is so even if it were ruled that the state of Kansas was made trustee under §9, because it would only be trustee of the bare legal title. In very many cases 'in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued not to the state, for the benefit of the railroad company, but directly to the company itself,' it has been held that the title vested absolutely in the railroad company. *Sioux City and St. P. R. Co.* v. *United States*, 159 U. S. 349, 364, 40 L. Ed. 177, 182, 16 Sup. Ct. Rep. 17, 23. * * * * In these circumstances we think it apparent that the name of the state is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction cannot be maintained."

It seems to us that the case just cited is clearly in point, as the court holds that the real party in interest was not the State of Kansas but the railroad company, and that the name of the state was simply inserted in order to give color to the claim of jurisdiction in the Supreme Court of the United States. The court clearly indicates by this decision that in order to give this court jurisdiction of a controversy between states, the state bringing the action must prosecute it for her own benefit—that it must be a suit to protect the rights of the state as such, and not enure only to the benefit of private persons. The state herself must be interested.

In *Smith* v. *Brittenham*, 109 Ill. 450, 549, one of the main questions determined by the court was the interest of the plaintiff to maintain the suit. The court in passing on this point said:

"It is a well recognized rule that in equity the party having the beneficial interest in the subject matter of the suit must sue in his own name for any invasion of his rights in respect thereto, although the legal title may be in another. (*Frye* v. *Bank of Illinois*, 5 Gilm. 332; *Elder* v. *Jones*, 85 Ill. 384; *Moore* v. *School Trustees*, 19 *id.* 83.) It is also well settled that no one, in the absence of some statute authorizing it, can maintain a suit in chancery with respect to real estate to which he has neither the legal nor equitable title. (*Bowles* v. *McAllen*, 16 Ill. 30; *Hoare* v. *Harris*, 11 *id.* 24.) If such an interest in the complainant is indispensable to the commencement of the suit, as will be conceded, the conclusion would seem to follow that where a party having such interest commences a suit, and before any hearing or disposition of the cause upon the merits voluntarily transfers all of his interest to another, and the same is made to appear of record, as is the case here, the whole proceeding will become so defective for want of proper parties, that no valid decree can be entered in the cause until the complainant's assignee, by some supplemental bill, or otherwise, makes himself a party complainant to the suit—and this, indeed, is the well recognized doctrine and practice in such cases. *Mason* v. *York and Cumberland R. R. Co.*, 25 Me. 82."

In *Ashby* v. *Ashby*, 39 La. Ann. 105 (1 So. 282), the suit was instituted by a plaintiff claiming to be judgment creditor of one of the defendants. Exception was taken on the ground that the petition disclosed no cause of action. This exception was deferred for decision to the merits of the case. The court in sustaining this exception announced the following as its decision as shown by the syllabus in the case:

"An action can only be brought by one having a real and actual interest, which he pursues. So, where one claiming to be a judgment creditor of another seeks to annul a mortgage executed by the latter in favor of his children on the ground of fraud, and the record shows that the judgment on which the suit is founded is not in favor of the plaintiff, but in favor of her minor children, for which she is tutrix, and who had attained their

majority before the action of nullity was brought, and they do not join in the action, the suit must be dismissed."

In *Oakley* v. *Bend*, 3 Edw. Ch. (N. Y.) 482, the action was brought in the name of certain persons as bankers who had received the note or paper sued on to collect the same, the authority to collect being transmitted under power of attorney given by the owners of the note. The court in holding that the plaintiffs had no such interest in the subject matter of the suit as authorized a suit in their own names, in its opinion, said:

"A person who is a mere agent to sue for and collect money under a power of attorney cannot be a party to a bill for an account in his own name, nor to be joined as a co-complainant, with his principal. *King of Spain* v. *Machaao*, 4 Russ. 225, 240, recognized in *Clarkson* v. *Depeyster*, 3 Paige 337, as good ground of demurrer. As a general rule, if an agent institutes a suit under an authority from his principal he must do so in the name of his principal. *Leigh* v. *Thomas*, 2 Ves. 313. And, see Calvert, Parties, 229, 232, for the authority on the subject."

"In the present case the bill alleges that the complainants are mere agents for the Bank of Leeds, in England, under a power of attorney transmitted to them by one of its officers duly authorizing the collection of the bill of exchange which the bank discounted and to whom it belongs. This being so, the bill should be filed in the name of the bank, if they have the corporate capacity to sue under the Act of Parliament mentioned in the bill; or if they have it not, then in the names of the individuals composing the bank; and it is no excuse that the names of all have not been transmitted or furnished to the agents here or that they are very numerous and constantly fluctuating. To avoid the inconvenience of numerous complainants and changes of interest, this court may allow a bill to be exhibited in the names of a few, in behalf of all interested in the bank. Calvert, 40, 41; Story, Eq. Pl. 97, 114-117."

Virginia, Being Without Interest in the Unfunded Debt Held by Third Parties, Cannot Constitute Herself a Trustee, and Thus Create a Controversy Between Herself as Trustee and the State of West Virginia, and Thereby Maintain This Suit as to Such Unfunded Part of Said Debt.

Virginia does not contend that she has any interest in the unfunded debt represented by the certificates issued by her which can in anywise enure to her benefit. She contends that she has a right to enforce payment of the unfunded debt in her capacity as trustee so far as said unfunded debt relates to third parties who own the same. It is settled by the decisions that a mere nominal trustee cannot maintain a suit in his own name.

Malin v. *Malin*, 2 Johns. Ch. (N. Y.) 238 (1 L. Ed. 361).

Graham v. *Graham*, 3 Barb. Ch. (N. Y.) 24 (5 L. Ed. 801).

Collins v. *Loffters*, 10 Leigh (Va.) 5 (34 Am. Dec. 719, and note 722).

Nichols v. *Williams*, 22 N. J. Eq. 63.

Elmer v. *Loper*, 25 N. J. Eq. 475.

Field v. *Maghee*, 5 Paige Ch. (N. Y.) 539, assignee suing in name of assignor who was without interest in the subject matter of suit.

Dean v. *Seyman*, 11 N. J. Eq. 220.

Wilink v. *The Morris Canal & Banking Co.*, 4. N. J. Eq. (3 Green) 377, 390, 397.

Blake v. *Allman*, 58 N. C. 407.

Elwell v. *Bursinger*, 70 Tex. 120 (8 S. W. 77).

In *State ex rel. Rife* v. *Hawes*, 177 Mo. 360 (76 S. W. 653), the action was mandamus by the state against Hawes and others as a board of police commissioners of the city of St. Louis to compel them to draw a warrant in favor of the relator for payment for himself and others as members of the police force of the city of St. Louis. Judgment was rendered for the relator, and the respondents appealed.

Under the laws of the State of Missouri, a trustee of an express trust may maintain an action in his own name, provided the declaration of trust be in writing. The court found from the record in the case that the real owner of the claim or debt was an individual by the name of Blair; that there was no consideration paid to Blair by the relator or any one else for a transfer of the claim; that Blair never sold his claim to the relator, and never intended to do so; that Blair would receive the fruits of the litigation, and that the action was brought by the relator for himself and his fellows purely as a matter of economy. It was held that Hawes as trustee had no such interest in the matter involved in the action as to maintain it in his own name, and the proceeding was accordingly dismissed for want of interest in the plaintiff.

But we do not concede that Virginia, as to the unfunded debt not assumed by her, is a trustee in reference thereto. To say that Virginia is a trustee of the part of the old debt which Virginia arbitrarily declared is West Virginia's equitable proportion thereof, and for which she is no longer liable, is to announce the proposition that a trust may be created having for its sole object the institution of a law-suit, and that therefore Virginia may bring this suit. Such a proposition is wholly foreign to every principle of the law relating to express trusts. Indeed, after a valid express trust has been created, the legitimate duties of the trustee defined, and the legal title to the property has passed to the trustee, ordinarily the courts will not permit him to bring a suit touching the trust property unless the beneficiaries are also before the court.

The fundamental idea of any kind of a trust contemplates the legal title to the trust subject inhering in the trustee, while the benefits which it carries accrue to and belong to another. This is elementary law.

Wallace v. *Wainwright*, 87 Pa. 263.
Seymour v. *Freer*, 75 U. S. 202 (19 L. Ed. 306).
Commissioners v. *Walker*, 6 How. (Miss.) 143 (38 Am. Dec. 433).
1 Minor on Real Prop., sec. 459.
2 Washb. on Real Prop., 4th Ed. 458.
Tiedeman on Real Prop., sec. 325.

The Court says, in *Seymour* v. *Freer, supra*:

> "A trust is where there are rights, titles and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion: but behind it lies beneficial rights and interests in the same property belonging to another."

Mr. Minor, speaking of a trust as to real property, says:

> "A trust estate is a right *in equity* to take the rents and profits of lands, whereof the legal estate is vested in some other person, called the *trustee;* and to compel such trustee (subject to the discretion which may be vested in him) to execute such conveyance of the land as the person entitled to the profits, who is called the *cestui que trust,* shall direct."

Mr. Washburn says:

> "A trust may, therefore, be defined as a use, which, though lawful in itself, the statute does not operate upon to execute in the *cestui que use,* whereby the legal estate is in one, while another has a right to a beneficial interest in and out of the same, the first being termed a *trustee,* the other a *cestui que trust.*"

These few cases, of the very great number that could be cited, clearly establish the doctrine that a trustee is the holder of the legal title for some lawful and beneficial purpose, enuring to the benefit of a third party, usually called the *cestui que trust.*

It is also elementary law that, while the legal title gives the trustee dominion over the property in a court of law, in a court of equity the real owner is the *cestui que trust.* Here his rights are guarded and protected to the same extent as if he were the absolute owner.

To constitute a valid trust there must be a lawful and definite object to which the subject matter is to be devoted.

> 29 Am. & Eng. Enc. L. (2d Ed.) 866, and the many cases there cited.

Here the object of the trust is definite. It is for the purpose, through the agency of the debt commission, by and with the advice and consent of the attorney general of Virginia, in the name of Virginia, to bring a suit against West Virginia for the recovery of this alleged

debt represented by the certificates. This is not a lawful object. In all the multitude of decisions, either in this country or any other jurisdiction where the doctrines of the common law and equity have been recognized and prevail, has such an object of a trust ever appeared? Can a trust have such an object? We believe not. Is it not contrary to public policy thus to encourage litigation?

Virginia herself declined to bring any suit against West Virginia, and for the very valid reason that, as alleged by her, she has already adjusted her equitable proportion thereof and could have no interest in such a suit. She also declined to bring this suit, except at the request of the holders of these certificates and only on the condition that they should be turned over to the debt commission *for that purpose*, and that *the beneficiaries would bear all the expenses of the litigation, even to the payment of the compensation and expenses of her own debt commission.*

Is this suit, therefore, one brought by Virginia in her capacity as a trustee? That is, does she occupy the attitude before this Court of a lawful trustee acting under an express trust, bringing a suit to enforce a trust having a valid object and purpose? This question certainly carries its own answer in the negative.

But to recur to the proposition that a trustee of a valid trust will not be permitted to bring suit touching his trust property unless the beneficiaries are also before the court, reliance is had upon the following authorities:

> Story Eq. Pl. (9th Ed.), sec. 207.
> *Fish* v. *Howland*, 1 Paige Ch. (N. Y.) 20.
> *Reed* v. *Reed*, 16 N. J. Eq. 248.
> *Monday* v. *Vance*, 11 Tex. Civ. App. 374 (32 S. W. 559).
> *Ebell* v. *Bursinger*, 70 Tex. 120 (8 S. W. 77).

In *Ebell* v. *Bursinger*, cited above, the following appears in the opinion of the court:

> "Two questions are presented by the assignment: *First*, was the *cestui que* trust a necessary party to the suit? and, *second*, can the objection for want of a necessary party be taken by motion in the court below after default or upon appeal? As to the first question,

the general rule is well established that, in suits by or against the trustee for the recovery of the trust property, the beneficiary is a necessary party. *Boles* v. *Linthicum*, 48 Tex. 224; *Huffman* v. *Cartwright*, 44 Tex. 296; *Hall* v. *Harris*, 11 Tex. 300; *Holland* v. *Baker*, 3 Hare 72; *Woodward* v. *Wood*, 19 Ala. 213; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256; *Richards* v. *Richards*, 9 Gray 313; *Ward* v. *Hollins*, 14 Md. 158; 1 Daniell Ch. Pr. (5th Ed.) 220, and note; Story Eq. Pl. §207; 2 Perry, Trusts, §873."

It is admitted that to this rule there are some exceptions. Thus, if the trustee holds the title to the property to manage and dispose of it and to do all other things to promote the purposes of the trust, he may represent the beneficiaries in a suit, and thus dispense with them as parties.

Kerrison v. *Stewart*, 93 U. S. 155 (23 L. Ed. 843).

So, another illustration is found in the case of trustees in a mortgage to secure a series of negotiable bonds upon the property of railroad companies.

Shaw v. *Railroad Co.*, 5 Gray 162.

Or where the beneficiaries are so numerous that it would be inconvenient to make them parties.

Story Eq. Pl., sec. 207*a*.

But it will be borne in mind that these principles are applicable only to valid trusts, to express trusts having a lawful object.

Furthermore, these certificates were not issued by West Virginia. They were issued by Virginia without the consent of West Virginia. West Virginia never has recognized their legality, or Virginia's wrongdoing in issuing them. And these certificates are not held by the State of Virginia, but by seven members of a commission created by a joint resolution of the General Assembly of Virginia, who as such commission are authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the public debt of the original State of Virginia proper to be borne by West Virginia. This joint resolution was approved March 6, 1894, and by an act of March 6, 1900, this commission was to receive and take upon deposit the cer-

tificates or to have the same otherwise placed or held on deposit subject to their control, upon an agreement and contract on the part of the holders of said certificates that if said commission would secure a settlement with West Virginia with respect to said certificates the holders would accept the amount realized upon such settlement from West Virginia "as a full settlement of all the claims thereunder." (R. pp. 47-51.)

Thus, it will be seen that this commission as an independent body holds these certificates by contract with the owners thereof that they will negotiate a settlement with West Virginia in regard to the matter. the State of *Virginia disclaiming in the joint resolution any liability on account of these certificates;* and likewise disclaimed such liability in the act of March 6, 1900, giving this commission power to take into its possession and control the certificates and to negotiate a settlement thereof with West Virginia.

The Principles of Law Governing Suits Between Private Persons Are Applied to Controversies Between States.

The principles of equity applicable in cases between individuals must necessarily be applied in the settlement of controversies between states when these controversies have been brought into court for settlement. The authorities are so numerous upon this proposition and the doctrine seems so well settled, that it scarcely seems necessary to cite them here; yet for the convenience of the court we cite a few of the many authorities bearing on this matter.

In considering the question of the rights of the State of Virginia in this suit, it must be constantly borne in mind that her rights as a state, when she becomes a suitor, are no greater or different from those of a private person. The same rules govern in such case as govern in suits between individuals.

In *State* v. *Cloudt*, ____ Tex. Civ. App. ____ (84 S. W. 415), which was an action brought by the state to recover taxes due the plaintiff on a section of land, the court says:

> "When a state appears as a party to a suit, she voluntarily casts off the robes of her sovereignty, and

stands before the bar of a court of her own creation in the same attitude as an individual litigant; and her rights are determined and fixed by the same principles of law and equity, and a judgment for or against her must be given the same effect as would have been given it had it been rendered in a case between private individuals."

In *State ex rel. Taylor* v. *Lord*, 28 Or. 489 (31 L. R. A. 473), which was an action by the State to enjoin the defendants from executing the provisions of a statute relative to the location and erection of a branch insane asylum, the court, speaking of what it had decided on a former appeal of that case, reported in 26 Or. 205, said:

"When this case was here before (26 Or. 205, 25 L. R. A. 862) we held that a private individual could not have public officers enjoined from using public funds, unless it could be shown that some civil or property rights were being invaded, or, in other words, that the individual was going to get hurt by the transaction. Upon that principle it was decided that he should be required to show that the location and building of the branch asylum in eastern Oregon would be attended with greater cost and expense than if constructed at the capital, thereby increasing the burden of taxation which would be imposed upon him, with others, whose duty it is to contribute to the support of the government. It was also held that the state, suing in its corporate capacity, for the protection of its property rights, stood in no different or better position in this regard than an individual. This doctrine is supported by high authority. Allen, J., in *People* v. *Canal Board*, 55 N. Y. 395, says: 'When the state as plaintiff invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors: that is, it must establish a case of equitable cognizance, and a right to the particular relief demanded.' And as is said by the same eminent jurist in *People* v. *Ingersoll*, 58 N. Y. 14 (17 Am. Rep. 178): 'A distinction is to be observed between actions by the people or the state, in right of the prerogative incident to sovereignty, and those founded upon some pecuniary interest or proprietary right. The latter are governed by the ordinary rules of law by which rights are deter-

mined between individuals. To the same effect is the doctrine announced in *People* v. *Fields*, 58 N. Y. 514. See also 2 High, Inj., §1327. So that we then concluded the plaintiff herein occupied no better or superior position, from a legal standpoint, for enforcing the remedy sought to be invoked, than the plaintiff in *Sherman* v. *Bellows*, 24 Or. 553. From this position we see no sufficient reason for receding, as we believe it to be sound in law, and supported upon reason and authority."

The first point of the syllabus in the case of *State ex rel Smyth, Atty. Gen.*, v. *Kennedy*, 60 Neb. 300 (83 N. W. 87), is as follows:

"When a state invokes the judgment of a court for any purpose, it lays aside its sovereignty, and consents to be bound by the decision of the court, whether such decision be favorable or adverse."

To the same effect are the following cases:

Green v. *State*, 73 Cal. 29 (14 Pac. 610).
Harris v. *State*, 9 S. D. 453 (69 N. W. 825).
State v. *Paxson*, 119 Ga. 730 (46 S. E. 872, 873).

This Court Follows the Former Practice of the Courts of King's Bench and of Chancery, in England, in Cases of Original Jurisdiction in Equity.

The rules of this Court governing controversies between States do not differ materially from those where individuals are parties. The principles of law are the same. This Court, in *California* v. *Southern Pacific Company*, 157 U. S. 229 (39 L. Ed. 683), the late Chief Justice Fuller delivering the opinion, said at page 248:

"By the third of our general rules it is provided: 'This Court considers the former practice of the courts of King's Bench and of chancery, in England, as affording outlines for the practice of this Court; and will from time to time make such alterations therein as circumstances may render necessary.' This rule is, with the exception of some slight verbal alterations and the addition of the word 'former' before the word 'practice' in the first line, the same as original general rule seven, adopted August 8, 1791. 1 Cranch, XVII; 2 Dall.

411. And in cases of original jurisdiction it has been determined that this Court will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and that the rules of court in chancery should govern in conducting the case to a final issue (*Rhode Island* v. *Massachusetts*, 73 U. S. 12 Pet. 657; 38 U. S. 13 Pet. 23; 39 U. S. 14 Pet. 210; 40 U. S. 15 Pet. 233; *Georgia* v. *Grant*, 73 U S. 6 Wall. 241) although the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice. *Florida* v. *Georgia*, 58 U. S. 17 How. 478."

The Court further says in the course of the opinion:

"We have no hesitation in holding that when an original cause is pending in the court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

All through the foregoing case this Court keeps constantly before it the well settled doctrine of equity jurisprudence and practice in deciding original cases brought before it on the chancery side.

Many times this Court has been called upon to decide controversies between states. Examination will disclose that in each case there was some well marked ground as the basis of a controversy. We call the Court's attention to some illustrative cases of the principle that this Court, in determining the rights of parties in an equity cause of original jurisdiction, has always been governed by the doctrines obtaining in the English court of chancery.

In the case of *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 519 (14 L. Ed. 249), the Court said:

"The rules of the High Court of Chancery of England have been adopted by the courts of the United States, and there is no limitation to the exercise of a chancery jurisdiction by these courts except the value

of the matter in controversy, the residence or character of the parties, or a claim which arises under the laws of the United States and which has been decided against it in a state court.

In exercising this jurisdiction the courts of the Union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no courts of chancery have been established. The usage of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed."

See also the following cases:

Rhode Island v. *Mass.*, 15 Pet. 233 (10 L. Ed. 721).

Florida v. *Georgia*, 58 U. S. 478 (15 L. Ed. 181).

This Suit Discloses no Controversy Between the Two States, as to the Unfunded Debt Represented by Certificates Owned by Individuals.

The agreement between the holders of the certificates and the Virginia Debt Commission provides for their return to said holders in case they are not collected (R., pp. 97, 98), and if collected a method is provided for the distribution of the proceeds of such collection among the owners of the certificates. (R., pp. 68, 69, 98.)

So it is apparent upon the record of this suit that the great Commonwealth of Virginia as a State has not an iota of interest in this suit or in its result. *She does not even incur one cent of costs should it be decided against her.* She was not to bring this suit except at the request of the holders of these certificates (R., p. 49), and not even then until she was first indemnified against any expense to her incurred by the bringing and carrying on of such suit. (R., p. 49.) If there be any controversy in reference to said debt, it is between the holders of said certificates and West Virginia, and not between Virginia and West Virginia.

The conditions upon which this suit was instituted were very much like those prescribed by the act of the legislature of New Hampshire, section 2 of which provided as follows:

"Upon each deposit being made, it shall be the duty of the attorney general to examine such claim and the evidence thereof, and if, in his opinion, there is a valid claim which shall be just and equitable to enforce, vested by such assignment in the State of New Hampshire, he, the attorney general, shall, upon the assignor of such claim depositing with him such sum as he, the said attorney general, shall deem necessary to cover the expenses and disbursements incident to or which may become incident to the collection of said claim, bring such suits, actions or proceedings in the name of the state of New Hampshire, in the Supreme Court of the United States, as he, the said attorney general, shall deem necessary for the recovery of the money due upon such claim; and it shall be the duty of the said attorney general to prosecute such action or actions to final judgment, and to take such other steps as may be necessary after judgment, for the collection of said claim, and to carry such judgment into effect, or, with the consent of the assignor, to compromise, adjust and settle such claim before or after judgment."

New Hampshire v. *Louisiana*, 108 U. S. 76 (27 L. Ed. 656, 659).

Section 3 of this act provided:

"Nothing in this act shall authorize the expenditure of any money belonging to this state, but the expenses of said proceedings shall be paid by the assignor of such claim; and the assignor of such claim may associate with the attorney general in the prosecution thereof, in the name of the state of New Hampshire, such other counsel as the said assignor may deem necessary, but the state shall not be liable for the fees of such counsel or any part thereof."

New Hampshire v. *Louisiana*, *supra*.

The State of New Hampshire became the holder, as assignee of one of its citizens, of a part of the bonded obligation of Louisiana for the purpose of requiring payment thereof from Louisiana, and for the purpose of coercing payment suit was brought by New Hampshire against Louisiana.

This Court in its opinion says:

> "No one can look at the pleadings and testimony in these cases, without being satisfied, beyond all doubt, that they were, in legal effect, commenced, and are now prosecuted, solely by the owners of the bonds and coupons. In New Hampshire, before the attorney general is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the state can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney general such counsel as he chooses, the state being in no way responsible for fees. All moneys collected are to be kept by the attorney general, as special trustee, separate and apart from the other moneys of the state, and paid over by him to the owners of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the attorney general, is also signed and was evidently drawn by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the state and the attorney general are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the state. * * * * * *
>
> "It is contended, however, that, notwithstanding the prohibition of the amendment, the state may prosecute the suits, because, as the sovereign and trustee of its citizens, a state is 'clothed with the right and faculty of making an imperative demand upon another independent state for the payment of debts which it owes to citizens of the former.' There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties.

As was said in *U. S.* v. *Diekelman*, 92 U. S. 524, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war.

"All the rights of the states as independent nations were surrendered to the United States. The states are not nations, either as between themselves or toward foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political *status* at home and abroad is that of states in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, enter into any agreement or compact with another state. Art. 1, sec. 10, cl. 3."

Discussing the effect of the Eleventh Amendment, taking away the right of an individual to sue a state of the Union, the Court says:

"The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states or aliens, without the consent of the state to be sued and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the constitution, by assuming the prosecution of debts owing by the other state to its citizens."

An examination of the pleadings and exhibits filed with them unquestionably discloses that the real parties to this suit are the holders of the Virginia deferred certificates, representing West Virginia's alleged proportion of the old debt, on the one side, and the state of West Virginia on the other, and hence cannot be maintained in this Court.

In *Ex parte Ayers*, 123 U. S. 443 (31 L. Ed. 216), this court held that—

"Whether a suit is within the prohibition of the Eleventh Amendment is not always determined by

> reference to the nominal parties on the record, but by a consideration of the nature of the case."

The principle here announced is considered in the opinion at some length, from which we take this excerpt:

> "The very question was presented in the cases of *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, 108 U. S. 76. In each of those cases there was upon the face of the record nominally a controversy between two states, which, according to the terms of the Constitution, was subject to the judicial power of the United States. So far as could be determined by reference to the parties named in the record, the suits were within the jurisdiction of this Court; but, on an examination of the cases as stated in the pleadings, it appeared that the state, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof who had transferred their claims to the state for the purpose of suit. It was accordingly unanimously held by this Court, that it would look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit."

In order to create a "controversy between two states," there must be an actual controversy between them in which both parties have an interest. The word "controversy" has been the subject of frequent consideration by the federal courts, and especially as it relates to the removal of causes from a state to a federal court. In all the cases in which it has been the subject of judicial consideration it is treated as meaning an *actual* controversy in which both parties have an interest.

Sheldon v. *Keokuk N. L. P. Co.*, 1 Fed. 789.

Every case that has ever come before this Court involving a controversy between states, has been one affecting boundaries and jurisdiction over lands, or cases directly affecting the property rights and interest of a state.

This is the conclusion deduced by Mr. Justice Shiras from an exhaustive examination of the cases bearing on the subject in *Missouri* v *Illinois*, 180 U. S. 208 (45 Law Ed. 497), and a review of the cases

by Mr. Justice Brewer in *South Dakota* v. *North Carolina*, 192 U. S. 286 (48 Law Ed. 448).

The cases illustrating the soundness of this deduction may be thus classified:

New Jersey v. *New York*, 5 Pet. 285 (8 Law Ed. 127); *Rhode Island* v. *Massachusetts*, 12 Pet. 657 (7 Law Ed. 1233); *Florida* v. *Georgia*, 11 How. 293 (13 Law Ed. 702); *Virginia* v. *West Virginia*, 11 Wall. 39 (20 Law Ed. 67); *Missouri* v. *Iowa*, 7 How. 660 (12 Law Ed. 861); *Florida* v. *Georgia*, 17 How. 478 (15 Law Ed. 181); *Alabama* v. *Georgia*, 23 How. 505 (16 Law Ed. 556); *Louisiana* v. *Mississippi*, 202 U. S. 1 (50 Law Ed. 913); *Missouri* v. *Kentucky*, 11 Wall. 395 (20 Law Ed. 116), and *Maryland* v. *West Virginia*, 217 U. S. 1 (54 L. Ed. . . . .), recently decided by this Court, were cases relating to the boundary lines of the respective states bringing the suits.

In *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 18 (14 L. Ed. 249), it appeared that the state had constructed lines of transportation connecting with the Ohio river, a navigable stream, from the tolls upon which the state derived a revenue, and the defendant, a corporation of another state, had constructed a bridge across said river, by reason of which the navigation was obstructed and the revenues of the state decreased. The court sustained its jurisdiction in this case because of the injury resulting directly to the State of Pennsylvania.

The case of *Missouri* v. *Illinois*, 180 U. S. 208 (45 Law Ed. 497), involved a threatened injury by the State of Illinois to the health and prosperity of the inhabitants of Missouri and an injury to that portion of the bed or soil of the Mississippi River which lies within the territory of Missouri.

In *South Dakota* v. *North Carolina*, 192 U. S. 286 (48 Law Ed. 448), the title to the bonds sued on was vested absolutely in the State of South Dakota, and they were not held in a representative capacity, as in the case of *New Hampshire* v. *Louisiana*, 108 U. S. 76 (27 Law Ed. 656), as they were given outright unconditionally to the plaintiff state in that case.

In *Florida* v. *Georgia*, 17 How. 478 (15 Law Ed. 181), the United States was permitted to intervene because she was the proprietor of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The State of Florida was also deeply interested as a proprietor.

In the exercise of their jurisdiction, the federal courts have often felt called upon to decide whether or not the state had such an interest in the subject matter of litigation as to uphold or defeat the jurisdiction of the court.

To determine in whom the real interest resides or inheres, the court will look beyond the nominal parties. *Missouri, K. & T. R. Co.* v. *Hickman*, 163 U. S. 53 (46 Law Ed. 78). From the record in the cause it will ascertain whether or not the judgment or decree will operate upon the pecuniary or material interests of the state, or upon the interests of individuals only. In the case last cited this Court in its opinion says: "Was the state the real party plaintiff?" In answering this question, the court discusses the practice after the adoption of the Eleventh Amendment, and shows that in determining whether or not a state is the real party plaintiff or defendant, it will go behind the mere allegation as to the nominal party; and, applying this principle, says:

> "It may fairly be held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson* v. *Ross*, 3 L. R. A. 322, 38 Fed. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the state, and it was held by the circuit court for the eastern district of New York that the action was one in which the real party plaintiff was the state. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery."

The case from which we have just quoted was a suit brought in a

state court of Missouri against certain individuals constituting the State Board of Railroad and Warehouse Commissioners of the state, and in which the state court had refused to order a removal to a federal court. The question involved was, on the motion for removal, whether or not the state was the real party in interest. The Missouri court held that it was, and the state not being a citizen within the meaning of the removal act, of course there could be no removal, if indeed the state were the real party in interest, and not the board of commissioners.

In considering the question whether or not the state was the real party in interest, the Court says:

> "It is true that the state has a governmental interest in the welfare of all citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common. The interest must be one in the state as an artificial person."

As stated by this Court, the supreme court of Missouri held that the state had a direct pecuniary interest in the result of the litigation, by virtue, first, of its possible liability for costs, and, secondly, because, were the litigation pushed to the extreme, there might be penalties imposed which would, when collected, pass into the school fund of the state. This Court holding that these considerations, actuating the supreme court of Missouri to decide as it did, were not sufficient to make the state the real party in interest, and says:

> "We are of opinion, therefore, that the party named in the record as plaintiff is the real party plaintiff, and that the voluntary assumption by the state of the costs in some contingencies of the litigation, or the indirect and remote pecuniary results which may follow from a disobedience of the orders of the court, do not make it

> the party to whom alone the relief sought inures, and in whose favor a decree for the plaintiff will effectively operate."

So, it is by invoking this principle that the court will look beyond the mere allegations of the pleadings, with reference to parties, and ascertain and determine, for the purposes of its jurisdiction, who are the real parties in interest. *Ex parte Ayers*, 123 U. S. 443 (31 Law Ed. 216).

In *Louisiana* v. *Jumel*, 107 U. S. 711 (27 Law Ed. 448), though nominally a suit between individuals, the Court held that the real party to be affected by the action of the Court was the state, because its judgment must operate against the state itself. And may we not say, *converso*, that if the judgment or decree of the Court does not operate in favor of the state it is not, nor can it be, a party plaintiff?

In *Antoni* v. *Greenhow*, 107 U. S. 769 (27 Law Ed. 468), it was held that a suit to compel the officers of a state to do the acts which constitute a performance of its contracts by the state is a suit against the state itself, although the state is not nominally a party to the suit.

The cases could be multiplied illustrative of the principle that the court will and must look to the effect of its judgment or decree in determining the question as to whether the state is the real party whose rights or interests will thereby be affected so as to make it a plaintiff or a defendant in the suit, as the case may be.

Alabama v. *Burr*, 115 U. S. 413 (29 Law Ed. 435), was a suit at law brought in this Court by the State of Alabama against citizens of the States of Massachusetts and New Jersey. The defendants demurred generally to the declaration. The demurrer presented the question whether the facts in the declaration were sufficient to support the action. The court in considering the demurrer concluded that the state in her declaration failed to show any such acts affecting the interests of the plaintiff as authorized her to maintain the suit. The Court in its opinion said that the injury to innocent stockholders by the wrongful acts of the company and the defendants was direct and immediate, because their property was taken and fraudulently

converted to the use of the defendants or other wrongdoers. "To the state, however," said this Court, "the injury, if any, was both indirect and remote, because the state had no direct claim upon, or interest in, the property which was misappropriated." Therefore, the Court, by a unanimous opinion, sustained the demurrer and dismissed the action.

New York v. *Connecticut*, 4 Dall. 3 (1 Law Ed. 715), was an application by the plaintiff for an injunction to stay proceedings in certain ejectment causes brought in the State of Connecticut. The prayer for injunction was argued with great force and ability. The plaintiff was not a party to the ejectment suits, but it was contended that New York was interested to preserve peace and good order, to protect individuals, to indemnify those who trusted to her faith and even to prevent dismemberment of her territory; that this political and moral obligation and regard for her public improvements and fiscal operations, created an interest of the highest character in the government of New York, and one entitling her to maintain this bill for the purpose of its prayer. But the Court held that the State of New York was not a party to the suits below, nor interested in the decision of those suits, and that the injunction ought not to issue. Thereupon the attorney general of the State of New York said to the Court: "In every grant by New York, there is a reservation of gold and silver mines, and of five acres per cent for roads. The bill might, besides, be amended, by averring the state to be interested in a residuum of the land, if that would be sufficient to sustain the prayer for an injunction." Mr. Justice Washington replied: "The amendment would not satisfy me; for my opinion is founded upon the fact, that New York is not interested in the suits below." The actions of ejectment were brought by grantees of Connecticut against grantees of New York to obtain possession of the land.

An examination of all the cases decided by the federal and state courts discloses no instance wherein the state has been permitted to maintain an action or suit, the judgment or decree of which would not inure to the state. In other words, the courts have placed the right of suit on the part of a state upon the same principle with reference to interest, that is always applied in suits by individuals.

An Accounting Cannot Be Maintained by Virginia in This Suit.

One part of the prayer of the bill in this case is

> "that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix in her own right and as trustee" (R., pp. 16, 17).

Whether this bill may be maintained for an accounting as to matters claimed in her own right we shall presently consider; but that it cannot be maintained in her representative capacity as a trustee seems to us quite clear. The suit in her capacity as trustee relates to the unfunded part of the debt in the hands of third parties, from which Virginia has been released, and which is alleged by Virginia to be one-third of the original debt existing on January 1, 1861.

It is a cardinal principle that no bill can be sustained for an accounting when the plaintiff in its own right is not interested in the result of such accounting. Under no circumstances can Virginia be interested in any account that may be taken as to the unfunded part of said debt which is claimed by Virginia and her creditors to be West Virginia's equitable proportion. There are several grounds for this lack of interest:

First, because Virginia and her creditors agreed to the amount which Virginia should assume as her part.

Second, because her bill and its exhibits show she will receive no part of the proceeds of the unfunded debt if West Virginia should pay any part thereof, but that all of it belongs and will go to the holders of said certificates, which represent such unfunded part.

Third, because West Virginia's liability, if any exists, is direct to the creditors and not to Virginia, as heretofore shown by the Wheeling Ordinance, the West Virginia Constitution of 1862 and the acts of the General Assembly of Virginia.

To sustain this suit on the ground of an accounting would violate one of the cardinal principles underlying this branch of the jurisdic-

tion of a court of equity. It is elementary law that the person seeking an account must have an interest of some sort to promote as a result of the accounting. If there be no such interest, the bill can not be maintained.

Nicholas v. *Anderson*, 8 Wheat. 365 (5 Law Ed. 637).
Ball v. *Carew*, 13 Pick. 28.
McCabe's Appeal, 22 Pa. St. 427.

In *Nicholas* v. *Anderson*, *supra*, a bill in equity was filed by and in the name of the attorney general of Virginia, under the authority of a special act of the legislature of that state, passed on October 15, 1813, for the better locating and surveying of the lands given to the officers and soldiers on continental and state establishments. The act provided that all persons holding officers' and soldiers' warrants by assignment should pay down to the principal surveyor, at the time of the delivery of such warrants, one dollar for every hundred acres thereof, exclusive of the legal surveyor's fees, toward raising a fund for the purpose of paying all contingent expenses, etc. The act further provided that the deputations of officers should appoint two principal surveyors, who were accordingly appointed, one of whom was the defendant, and who immediately took upon himself the duties of the office, and exacted, in virtue of the act of 1783, from all the holders of the military warrants, the one dollar per one hundred acres as provided in the act. The bill charged that the defendant had received a large sum of money in this way and had refused to account for the same to the complainant and the agents and attorneys appointed for this purpose under the act of 1813. It also charged a misapplication of the money; and that the deputations of officers, under the act of 1783, did appoint superintendents, etc., but that most of them had long since died and that the surveyors had declined to act for many years. The bill proceeded to state the substance of the act of 1813, which authorized one Colonel John Watts, the surviving superintendent, agent to settle with defendant, and to receive the moneys remaining unappropriated in his hands, and, if not paid, to sue for and recover the same in the name of the attorney general of Virginia; and then charged that the

defendant refused to account with Watts, and concluded with a prayer for an account, discovery and general relief.

To this bill the defendant demurred: and the circuit court of Kentucky, upon argument, sustained the demurrer and dismissed the bill. The case then came to this Court by appeal.

Mr. Justice Story, who delivered the opinion of the Court, after stating the case in substance as here stated, said:

> "The question in this case is, whether the demurrer was well taken. In support of the decree, two points are stated at the bar: 1st, that the plaintiff has not shown any interest in the subject, entitling the State of Virginia to maintain the bill: 2nd, that if there was originally any resulting authority to the state to compel an account, that power, by the erection of Kentucky into an independent state, devolved on the latter state, the defendant having been, and still continuing to be, a citizen of that state: and that it was not competent for the legislature of Virginia, in 1813, to pass a law which should bind a citizen of Kentucky to account for official duties which were not performed in virtue of any appointment made by the government of Virginia.
>
> "It is unnecessary to consider the last objection, because we are of opinion that the first is fatal to the bill. The act of 1783, for the better locating and surveying the lands given to the officers and soldiers on continental and state establishments, authorizes the deputations of officers, therein named, to appoint superintendents, in behalf of their respective lines, for the purpose of surveying the lands; and also to appoint two principal surveyors, and contract with them for their fees, etc. The third section of the act then provides, 'that every person or persons holding officers' or soldiers' warrants, by assignment, shall pay down to the principal surveyors, at the time of the delivering such warrant or warrants, one dollar, for every hundred acres thereof, exclusive of the legal surveyor's fees, toward raising a fund for the purpose of supporting all contingent expenses; or, at the option of such holder or holders, the same may be held up until warrants of all the original grantees have been surveyed; the said

surveyors to account for all the money so received to such person or persons as the said deputations may direct.' This is the clause upon which the bill is founded. And it is apparent, that in terms it provides for an accountability, not to the state, but to persons to be appointed by the deputations of officers; to those for whose benefit the fund was raised, and was to be applied, and not to the state, which had no interest whatsoever in it."

We are now brought to the second ground of recovery stated in the bill, which relates to

That Part of the Debt Not Held by Third Persons, But Which Virginia Avers She Holds in her Literary and Sinking Funds, in Her Own Right and Not as Trustee.

As to this part of the bill, we refer the Court to the answer: and, so far as pertinent to this phase of the case, the answer of West Virginia is as follows:

"This respondent denies that there was in addition to the above mentioned liability to the general public any other indebtedness evidenced by bonds held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the said State of Virginia as created under her laws, amounting, the former to $1,462,993, and the latter to $1,543,669.05, or to any other sums, as of the same date, as in the said bill is alleged, because this defendant avers that the commissioners of these two funds were and are mere state agencies, and public officials of the state, created by said State of Virginia to have the custody of and to preserve certain of her financial resources and obligations to be made available for specific purposes when necessary, and which now belong exclusively to Virginia and are held for her sole and exclusive use and benefit. Respondent denies that any of the bonds or certificates so alleged to be held by the Commissioners of the Sinking Fund and the Literary Fund were ever negotiated or sold by the State of Virginia, or that the same constituted a part of the public debt of that state on the first day of January, 1861, and denies that the certificates representing

> one-third of such bonds are now a part of the said public debt; and respondent avers that the State of Virginia has long since voluntarily canceled all of said bonds and the same are no longer of any force or validity."

It will be seen that the answer of the defendant controverts the allegations that the bonds held by the Commissioners of the Sinking and the Literary Funds of the State of Virginia constitute any part of the debt of Virginia within the meaning and contemplation of the said Ordinance of 1861, or of the constitution of West Virginia of 1862, and denies that such bonds so held constitute, or ever constituted, a part of the public debt of Virginia existing on the first day of January, 1861.

The commissioners of these two funds are mere state agencies or instrumentalities created by the Commonwealth of Virginia, to care for and preserve certain of her own financial resources, available for specific purposes, and which belong exclusively to Virginia. A few of the old bonds of Virginia issued prior to 1861 were by her converted into immediately available money by being deposited with these commissioners, and were therefore never sold and the title never transferred from her so as to create a liability against the state herself, and hence at no time was there ever any right of action or liability on account of these old bonds so deposited with the said commissioners which could properly be asserted against the old state. In other words, these few old bonds deposited with these commissioners did not create any debt against the State of Virginia. At no time or under any circumstances could these bonds have been made or become a legitimate subject matter of controversy or suit against the Commonwealth of Virginia. To make them such, would present the grotesque spectacle of a sovereign state suing herself for an accounting and payment to herself of her own funds, already under her absolute control.

Again: There can be no liability in favor of the Commonwealth of Virginia against the State of West Virginia on these bonds so held. The moneys in the sinking fund which purchased these bonds previous to the first day of January, 1861, were raised by the revenues of the entire state before the division, and they were therefore the

property of such entire state; and being owned by the state itself, the debtor, they were a dead asset both as to that portion of the state which passed into the new state and the State of Virginia as she remained, and Virginia claiming to be such owner has no more right to institute and prosecute a suit thereon against West Virginia than would West Virginia if a similar bond had fallen into her possession. If there is any liability in respect to said bonds it is a liability of the State of Virginia to the State of West Virginia for a portion thereof.

Then, if this were the status of Virginia as to the old bonds held by the commissioners of her Sinking Fund and Literary Fund prior to 1861, and which remained unchanged at the time of the formation of the State of West Virginia, could their refunding and the issuance of the deferred certificates as to the one-third of them, alter this status with reference to her right of suit thereon, or as to any part of them? The propounding of the question must evoke a negative answer.

The idea of debt necessarily implies an obligation payable by the debtor to some third party—a creditor existing independently of the debtor, and over whom, as to the obligation asserted, the debtor can have no control, and in the use or disposition of which the debtor has no right or interest whatever.

Upon what principle or ground or reason can Virginia claim that the old bonds placed by her with her commissioners of the Sinking and Literary Funds, were or are now any part of her *ante bellum debt?* We are wholly unable to perceive any. In fact, there is none.

If it be contended that the commissioners of the Sinking and Literary Funds are distinct entities from the state, persons clothed with an existence distinct and separate from the commonwealth, with the right to assert a liability against Virginia on account of these old bonds acquired by them prior to the erection of the territory contained within the boundaries of West Virginia into a state, then this Court cannot entertain jurisdiction of this suit, because these commissioners are necessary parties thereto; and the commission, having been created and existing by vrtue of the laws of Virginia, must be a citizen of Virginia, and if a distinct entity, it must necessarily be a corporation having its domicile in Virginia, where it was created.

Thus, it is seen that, in any aspect of the case, this Court has no jurisdiction of this suit so far as the certificates belonging to these commissioners are concerned. This feature itself of this cause can constitute no ground of controversy between the parties to the bill.

In the case of *Roe* v. *Marchand*, 86 Va. 107 (9 S. E. 995), we find the court saying:

> "A debt is an obligation due from one person to another, payment of which the latter has a legal right to enforce."

See also the case of *Harris* v. *Larsen*, 24 Utah 139, 1414 (66 Pac. 782).

The learned Master to whom this cause was referred had before him the question whether or not the bonds held by Virginia through the agency of her Literary and Sinking Funds constituted any part of the debt existing on the first day of January, 1861.

After careful consideration he deduces the following conclusion:

> "I am satisfied that the great weight of reason and authority is against the contention of the plaintiff, and I therefore find that the Sinking Fund with interest, and the Literary Fund with interest, within the meaning of the decree, were not a part of the public debt of the Commonwealth of Virginia on the first day of January, 1861" (Rep., p. 28).

True, Virginia has excepted to this part of the report; but the reasons assigned by the Master for his conclusion are so cogent, and the authorities cited and relied on by him in his report so conclusive, that further consideration of the question is not necessary. Therefore, we contend that Virginia cannot maintain this suit because of any claim by her on account of the certificates held by the Literary and Sinking Funds.

Virginia Is Not Entitled to Contribution from West Virginia.

The third ground stated in the bill upon which Virginia seeks relief alleges that Virginia has paid off or retired, of principal and

interest of said debt, a sum considerably in excess of $25,000,000, which she owns in her own right, and on account of which she avers that she has

> "a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor" (R., p. 13, Par. XVI of bill).

By reference to exhibit 3 of the bill (R., pp. 26, 38, and especially pp. 27-32), it will be seen that Virginia, by this act of her legislature, makes a full and detailed statement of the whole debt existing on January 1, 1861, stating it with reference to four distinct periods, to-wit: as of January 1, 1861; July 1, 1863; July 1, 1871; and July 1, 1882. Ascertaining by this statement the entire debt as of January 1, 1861, she by this act fixes as her just proportion thereof two-thirds of the entire debt. This statement purports to show the accrued interest and the various payments made by Virginia on account of said debt and its interest. It shows that she credits herself with every dollar paid by her on account of this debt, and deducts the aggregate of such payments from her assumed just proportion of two-thirds of said debt. By repeated declarations she avers this to be her just proportion, at the same time declaring the residue, one third, to be West Virginia's just proportion of said debt. It further shows that no part of any sum paid by Virginia on said debt was ever paid on account of any part of the one-third of said debt alleged to be West Virginia's just proportion. In fact, as shown by the record Virginia has paid nothing on account of any part of said debt she claims West Virginia should pay.

The answer of West Virginia with reference to this feature of the bill is as follows:

> "For further answer to said bill respondent avers that if any sum has been paid by Virginia, even though amounting in the aggregate to $25,000,000, including principal and interest to date, calculated at the rate of 6 per centum per annum, it was paid by her on account of her admitted just and equitable proportion of said public debt created prior to January 1, 1861; and if she has any claim at all against West Virginia on account of said alleged payment, which is not admitted,

but is denied, it can only be for such amount as may be ascertained upon the basis and according to the principles embodied in section 9 of the ordinance of the Virginia convention, as hereinbefore stated. So this respondent denies that she is liable for any part of the obligations mentioned in paragraph XV and paragraph XVI of the plaintiff's bill, alleged to have been taken up and paid on account of said public debt, and denies that the said Commonwealth of Virginia has, in her own right, a 'just claim' against West Virginia for contribution on account thereof.

"Respondent, for further answer to said paragraph XVI of said bill, avers that all accounts, vouchers and other records relating to the said public debt of Virginia, showing the payments made thereon, if any, and all other facts connected therewith, are now and always have been in the exclusive possession and control of the plaintiff, and respondent has no knowledge or information concerning the alleged payment of $25,000,000, or any other sum, on account of said debt existing prior to January 1, 1861, and therefore denies that plaintiff has paid said sum of $25,000,000, or any part thereof, and demands strict proof." (R., p. 157.)

Thus the answer positively denies any payment by Virginia on account of said debt which entitles her to contribution from West Virginia, thereby placing Virginia upon proof of this feature of her bill. The record is entirely barren of any proof in support of this allegation. Virginia could not properly take proof to bring this feature of the bill in issue, by reason of her failure to file a replication to the answer. In fact, the evidence, as shown by the contents of exhibit 3 of the bill, instead of supporting the bill in this regard, proves the truth of this part of the answer.

The cardinal principle of contribution is founded in and controlled by the doctrine of equity and natural justice, whereby one of two common debtors who has paid more than his *just share* of the common debt shall be permitted to call upon the other to contribute such sum to the one who has paid it all as will equalize the burden between the two.

White v. *Banks*, 21 Fla. 705 (56 Am. Dec. 283).

Owen v. *McGhee*, 61 Ala. 440.

Golsen v. *Brand*, 75 Ill. 148.

Chaffee v. *Jones*, 36 Mass. 260.

Campbell v. *Mesier*, 4 Johns. Ch. (N. Y.) 334 (8 Am. Dec. 570).

Moore v. *Moore*, 11 N. C. 358 (15 Am. Dec. 523).

Armstrong County v. *Clarion County*, 66 Pa. St. 218 (5 Am. Rep. 368).

Screven v. *Joyner*, 1 Hill Eq. (S. C.) 252 (26 Am. Dec. 195).

Jobe v. *O'Brien*, 21 Tenn. 34.

To entitle a party to enforce contribution, the one seeking it must have discharged the entire common or joint liability.

Culmer v. *Wilson*, 13 Utah 129 (44 Pac. 833).

The Bill Multifarious.

The question whether the bill is multifarious is yet open for discussion and decision. This Court, in disposing of the demurrer in this case, says:

> "Consideration of the objections of multifariousness, misjoinder of parties and of causes of action, may properly be postponed until the final hearing of a bill filed by the Commonwealth of Virginia against the State of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original State of Virginia which was assumed by West Virginia at the time of its creation as a state."
>
> *Virginia* v. *West Virginia*, 206 U. S. 290 (51 L. Ed. 1068).

And in a subsequent opinion, in referring the cause to a master, the Court said:

> "The answers to these inquiries to be without prejudice to any question in the cause."
>
> *Virginia* v. *West Virginia*, 209 U. S. 514 (52 L. Ed. 914).

One of the grounds of the defendant's demurrer filed to the plaintiff's bill was that of multifariousness, consisting in uniting two separate and distinct demands in the same bill. One of the grounds for an accounting set out in the bill is the claim or demand which Virginia asserts *in her own right* under two acts passed by the legislature of Virginia, on the 3d of February, 1863, and the 4th of February, 1863. This part of the bill appears in paragraphs VIII. and IX. of the bill at pages 7 and 8 of the record. The first act, under which it is alleged that certain property was transferred by the Commonwealth of Virginia to the State of West Virginia, reads as follows:

> "That all property, real, personal and mixed, owned by, or appertaining to this state, and being within the boundaries of the proposed state of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein: and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries standing in the name of this state, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state." (R., pp. 7, 8.)

By the fifth section it was enacted:

> "That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, provided that no such property, stocks and

credits shall have been obtained since the reorganization of the state government." (R., p. 8.)

The bill then charges that the property transferred to the state of West Virginia under this act was received and enjoyed by that state, and consisted of a number of items, the value of which amounted in the aggregate to "several millions of dollars," the bank stocks alone having realized to the state about "six hundred thousand dollars." (R., p. 8.)

The second act is as follows:

> "1. That the sum of One Hundred and Fifty Thousand Dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the states of the United States.
>
> "2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this state to make a statement of all the moneys that up to that time have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also all moneys that up to the same time have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this state." (R., pp. 8, 9.)

And the bill alleges that the sum of one hundred and fifty thousand dollars, "together with other sums belonging to the State of Virginia," were received and collected by the State of West Virginia, after its formation. It is also alleged in said bill in clause four of paragraph XVIII., at page 14 of the record:

> "The State of West Virginia has, since her creation as a state, received from the State of Virginia real and

> personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia." (R., p. 14.)

This feature of the bill is intended to embody the demand made by the commonwealth of Virginia *in her own right*, separate and distinct from any claim or demand of the creditors of Virginia.

The other feature of the bill presents the claim of Virginia, for an accounting with West Virginia for the latter's proportion of the public debt of Virginia prior to January 1, 1861.

It is alleged in the bill that on the 20th of August, 1861, the commonwealth of Virginia, in convention assembled, at the City of Wheeling, adopted an ordinance "to provide for the formation of a new State out of the portion of the territory of this state," and then quotes section 9 of the ordinance. (R., pp. 6, 7.)

It then alleges that West Virginia was admitted into the Union on the 20th of June, 1863, under a constitution which contained the following provisions:

> "5. No debt shall be contracted by this state except to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion, or defend the state in time of war."
>
> "7. The legislature may, at any time, direct a sale of the stocks owned by the state, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the state shall not become a stockholder in any bank."
>
> "8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." (R., p. 9.)

As is shown in the bill and elsewhere in this brief, Virginia settled with the holders of the old public debt by issuing new bonds for two-thirds of the amount thereof, which amount she declared to be her equitable proportion of such debt; and the creditors agreed thereto, and accepted the bonds. Virginia arbitrarily declared that the other one-third of the amount of her debt was the proportion for which West Virginia was liable, and for such one-third she issued certificates; and her creditors agreed thereto and accepted the certificates and released Virginia from all liability therefor. The bill then alleges:

> "By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who either by the express terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her." (R., p. 12.)

And it is also further alleged in the bill that:

> "All of the bonds and obligations and other evidence of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent of the aggregate of those liabilities, have been taken up and are now actually held by your Oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto." (R., pp. 12, 13.)

The several acts of the legislature of Virginia under which the debt was adjusted and the contracts made under which the certificates issued by the state have been deposited with the commission *in trust* for the purpose of bringing this suit, are exhibited with and made part of the bill; and it is alleged that "this suit has been instituted at the request and direction of the said Commission, and in strict conform-

ity with the provisions of said Act of March 6, 1900." See paragraph XX. of said bill, at p. 15 of Record.

Virginia seeks to obtain a decree in her own right for an alleged indebtedness against West Virginia, "evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and Literary Fund of the State, as created under her laws amounting, the former to $1,462,993.00, and the latter to $1,543,669.05," in addition to the other claims made in her own right. See par. I. of bill, at p. 3 of Record.

Another feature of the bill is that which sets up a claim on the part of Virginia in her own right against West Virginia for the unfunded debt represented by the certificates held by the Literary and Sinking Funds, financial agents employed by Virginia as part of the policy of facilitating the administration of her state government.

A further demand made by Virginia in her own right is that for contribution, which is purely an equitable demand. This we have already discussed, and again call the court's attention to this feature of the case to present more clearly the proposition of multifariousness.

In *Haines* v. *Carpenter*, 1 Woods 262 (Fed. Cas. No. 5905), a demurrer was filed to the bill, one ground of which was multifariousness. In discussing this point the Court said:

> "By multifariousness is meant the improperly joining in one bill, distinct and independent matters and thereby confounding them; as, for example, by uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent matter against several defendants in the same bill. 1 Coop. Eq. Pl. 182; *Saxton* v. *Davis*, 18 Ves. 72. In this bill the controversy raised by the heirs at law of the testatrix, touching the validity of the bequest of the will, is united with the claim of the heirs of George W. Graves, the husband of testatrix, to the property disposed of by the will; they claiming that the property descended to them, and did not belong to the testatrix, and could not therefore pass by her will, and with the suit of Elias W. Dennis, a creditor of the succession, whereby he seeks to recover judgment against the estate, and

with a demand for an account to be rendered by the executor. I do not think the adjudged cases furnish a better illustration of a multifarious bill. A bill by a creditor sought an account against an executor and trustee of the testator's estate, and also to set aside a sale made by the executor and trustee to a purchaser who was made a party to the bill; it was held demurrable for multifariousness, for the purchaser had nothing to do with the general settlement of the accounts of the estate, and ought not to be involved in any litigation respecting it. *Salvage* v. *Hyde*, Jac. 151. So when devisees and legatees brought a bill against the trustees and executors under the will and against a mortgagee of part of the estates, alleging collusion between the trustees and executors and the mortgagee, and that they refused to compel the mortgagee to account for the rents and profits, or to redeem the mortgage, and the bill prayed for an account of the testator's effects, and that the mortgage might be redeemed: the bill was held on demurrer by the mortgagee to be multifarious, for the mortgagee had nothing to do with the general settlement of the accounts of the estate. *Pearse* v. *Hewitt*, 7 Sim. 471. The case when unconnected parties are allowed to be joined in a suit are where there is one common interest among them all, centering in the point in issue in the cause. *Ward* v. *Duke of Northumberland*, 2 Anstr. 469."

In this case there was a uniting in the bill of different claims in different rights, and the court held that this was the uniting of several matters of a distinct and independent nature against several defendants in the same bill. This decision was subsequently affirmed by the Supreme Court of the United States, in 91 U. S. 254.

In *Cassels* v. *Vernon*, 5 Mason 332 (Fed. Cas. No. 2503), the bill was objected to on the grounds that the plaintiff united in his bill a claim for money as administrator of Mrs. Cassels, and also a claim in his individual capacity. The court in discussing this objection said:

"The bill is certainly incorrect in this union of inconsistent claims; and if the objection had been taken upon demurrer, it would have overthrown the bill.

unless an amendment was allowed. Courts of equity will not permit distinct and independent titles to be set up in the same bill, for that would be to allow multifariousness; much less will it permit inconsistent titles, or alternative titles, for that might tend to very inconvenient consequences in point of evidence. It is the duty of the party who seeks the assistance of the court, to state his own title directly, without any alternatives, and not to put the court upon the duty to select, out of many, any one, which it may ultimately think, upon the evidence, can be supported. See *Salvage* v. *Hyde*, Jac. 151; *Edwards* v. *Edwards*, *Id.* 335; *Mole* v. *Smith*, 1 Jac. & W. 665. This difficulty, however, could have been gotten rid of by an amendment; and coming on after a full answer, and a hearing by consent of parties, the shortest course will be to dismiss the bill as to all claims, except that made in the representative character."

In *Jones* v. *Foster*, 50 Miss. 47, the pertinence of the case and th points of law applicable here appear in the syllabus, which we he copy:

"Where J., as guardian of certain minors, sold real estate on time, under an order of the probate court, and took notes for the purchase money, and F. becoming the purchaser; and afterwards, J. sold other real estate, as administrator, and F. became the purchaser again, and executed notes for the purchase money, J. filed his bill to enforce his lien on the notes payable to him, both as guardian and as administrator; *held*, that the bill was bad for multifariousness.

"The bill cannot join several distinct, unconnected subjects, against the same defendant or against several defendants.

"A party cannot be pursued in the same suit in the double capacity of guardian and administrator, because the liabilities are separate and independent. *Wren* v. *Gayden*, 1 How. 365. The complainant, representing in his own person, separate and independent capacities and rights, and the defendant F. is pursued in respect to separate and distinct estates, acquired in different rights. Where several subjects are united, it must

appear, that as to the subject matters and the relief, all the defendants are connected, though differently, with the entire subject in dispute."

In *Van Mater* v. *Sickler*, 9 N. J. Eq. 483, the court said at page 484:

> "Second. The bill is multifarious. One object of the bill is to settle the personal estate of Isaac B. Van Mater. The complainant, as next of kin, calls on the defendant, who is the personal representative of the intestate, to answer in that capacity. But the complainant also, as an heir at law, calls upon the defendant to account for certain rents and profits which have come into his hands. It appears, from the bill, that the persons entitled to the rents, claim them as heirs at law, through their mother, who was the wife of the intestate. There are others than the heirs at law entitled to the rent, who, as next of kin, are interested in the distribution of the estate which the defendant represents. It is manifest, therefore, that these accounts cannot be settled in the same suit."

In *May* v. *Smith*, Busbee's Eq. 196 (N. C.) (57 Am. Dec. 594), the bill was filed by Peter May as the administrator with the will annexed of Reading Anderson, and part of the prayer is "that the defendants may account with the plaintiff for the assets of the deceased in their hands;" and another prayer is that the defendants may account "for the effects belonging to your orator deposited in their hands by the deceased." The court in holding that the bill could not be sustained said:

> "Here are two distinct and independent causes of action united: one to call in and collect the assets of the deceased; and the other to follow the effects of the plaintiff, effects due to him individually and in his own right. At law, an executor or administrator can not join a count for a debt due to him individually with one in his representative capacity. Neither can they be joined in equity; Adams' Eq., 2d Ed. 567; *Darone* v. *Fanning*, 4 Johns. Ch. 199; *Bedsole* v. *Monroe*, 5 Ired. Eq. 315. And the reason assigned is, that different decrees and proceedings might be

> required: for convenience, therefore, the joinder will not be permitted. For this cause the defendant might have demurred."

In *Bosley* v. *Phillips*, 3 Tenn. Ch. 649, a widow filed her bill to charge the defendant with a fund alleged to have been entrusted to her for delivery to the complainant by the husband, on his death-bed, as a gift *causa mortis*: and upon its being held by the supreme court, that the personal representative of the husband was a necessary party to the suit, the complainant took out letters of administration on the husband's estate, and asked leave to file an amended bill individually and as administratrix, praying relief either in her own right or in her representative capacity. The court refused to permit the amendment on the ground that to do so would be to allow the uniting in the same bill in chancery of distinct and hostile claims.

In *Sylvester* v. *Boyd*, 166 Mass. 445, the plaintiffs filed a bill against James O. Boyd and others. One of the prayers of the bill was that an account be taken of Boyd's doings as trustee in order that justice be done to the plaintiffs. None of the other defendants had any interest in the money alleged to have been misappropriated by Boyd, and none of them had any interest in his doings generally and his account as trustee. The plaintiffs also charged the making of a conveyance of valuable real estate and personal property to Peckham, which they averred was in violation of the duty of Boyd as trustee. The court in sustaining the demurrer said:

> "It is clear that different causes of action are joined which cannot properly be tried together, and that the demurrers should be sustained on the ground that the bill is multifarious. *Cambridge Water Works* v. *Somerville Dyeing & Bleaching Co.*, 14 Gray 193; *Metcalf* v. *Cady*, 8 Allen 587; *Sanborn* v. *Dwinell*, 135 Mass. 236; *Keith* v. *Keith*, 143 Mass. 262."

In *Leslie* v. *Leslie*, 84 Fed. 70, a bill was filed seeking to enforce the performance of a trust in real property, and also to quiet complainant's title to the same property. The court in holding the bill multifarious, said:

> "Under the state procedure, the complaint, as the pleading was there styled, would have been bad on

account of a misjoinder of causes of action. Code Civ. Proc. Cal. sec. 427; *Reynolds* v. *Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449. The general rules of equity practice which obtain in this court conduce to the same result. The bill is multifarious, in that it joins two distinct and unconnected grounds of equitable relief. 1 Fost. Fed. Prac., secs. 71-74."

In *Inman* v. *New York Interurban Water Co.*, 131 Fed. 997, the bill was filed to settle the right of ownership of stock of a corporation, and asking relief depending upon the ownership of such stock. The court held the bill multifarious, saying:

> "To settle such right and to ask relief which depends upon the right are two independent, disconnected and unrelated questions, and the bill which attempts to join them in one suit is multifarious. *Shields* v. *Thomas*, 18 How. 253, 259 (15 L. Ed. 368); *Walker* v. *Powers*, 104 U. S. 245 (26 L. Ed. 729)."

In *Cumberland Valley Railroad Company's Appeal*, 62 Pa. St. 218, the ninth point of the syllabus reads:

> "Charging two sources of right by a plaintiff renders a bill multifarious."

Point eleven of the syllabus of the same case is:

> "A bill is multifarious by the joinder of distinct, independent and separate causes of complaint, requiring different defenses and different decrees."

In *Alexander* v. *Alexander*, 85 Va. 353, especially at page 363, the court in discussing the doctrine of multifariousness, quoting from Lord Cottenham in *Campbell* v. *Mackey*, 1 My. & Cr. 603, says:

> "It is utterly impossible to lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition. For 'the cases upon the subject are extremely various, and the court, in deciding them seems to have considered what was convenient in the particular circumstances rather than to have attempted to lay down any absolute rule.' Yet, it will seldom, if ever, be found difficult to determine whether multifariousness exists in the particular case, if we will only bear in mind these cardinal rules

> upon the subject, namely, that a bill will always be deemed multifarious, where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite, in his answer and defense, different matters wholly unconnected with each other, and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing."

As has been seen, the certificates held by Virginia in her own right through the agency of the Literary and Sinking Funds, constituted no part of her debt, and are therefore eliminated from this suit. Therefore, now the only claim asserted by Virginia with reference to the debt is by virtue of her alleged holding of the certificates or canceled bonds *in trust* as to that part of the debt which Virginia claims should be paid by West Virginia to the holders thereof. If anything can be recovered at all in this suit on account of said debt, it must be that part which Virginia alleges she holds in trust for the creditors. She does not pretend to claim anything in her own right by virtue of any part of this unfunded debt. She has no interest in it, but is simply suing in her capacity as trustee for the sole use and benefit of the private persons who are holders of these certificates. This raises a very different controversy from that involved as to the claim asserted by Virginia in her own right.

To settle the claim of Virginia asserted in her capacity as trustee, it is necessary to decide whether or not the ordinance is to control the question, or the provision inserted in the constitution of West Virginia adopted in 1862, or whether the ordinance and the constitution shall be read *in pari materia*. In addition to this, the Court must determine whether or not the assumption by West Virginia of a just proportion of this debt was direct to the creditors themselves, so that the obligation inures to them only, or whether it was to Virginia, who might collect the same and distribute it to the creditors. Furthermore, in deciding this question of the right of Virginia to sue as trustee many other matters must be considered and decided in order to reach

a proper conclusion as to what constitutes a just proportion of this debt to be borne by West Virginia.

The claim asserted by Virginia in her own right arises under the two acts of February 3 and 4, 1863 (R., pp. 7, 8; App. to R., pp. 128, 131)—acts passed by Virginia long after the adoption of the ordinance and constitution by which an assumption of a just proportion of the public debt was made. The determination of the amount of the claim under these acts depends upon the extent of the property received by West Virginia and its market value at the time received. In this part of the bill Virginia as trustee, representing the creditors who hold the unfunded debt, has not a particle of interest. A very different character of evidence is required to establish it, and it is absolutely a distinct and separate claim from that with which Virginia is concerned as trustee.

It is true that courts of equity will so act in the administration of justice, if they may properly do so, as to avoid a multiplicity of suits; but in the language of Judge Woods in *Haines* v. *Carpenter*, Fed. Cas. No. 5905, "Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits."

In presenting the question of multifariousness, we have done so upon the assumption, which we think we may justly indulge, that this Court will be governed by its rules of practice applicable to cases involving an exercise of its original jurisdiction. In cases of this character, this Court has in many instances determined that its proceedings should be framed according to those which had been adopted in the English courts in analogous cases, and that the rules of courts in chancery should govern in conducting a case to its final determination.

Rhode Island v. *Mass.* 12 Pet. 57 (9 L. Ed. 1233).

Rhode Island v. *Mass.*, 13 Pet. 23 (10 L. Ed. 21).

Rhode Island v. *Mass.*, 14 Pet. 210 (10 L. Ed. 423).

Rhode Island v. *Mass.*, 15 Pet. 233 (10 L. Ed. 721).

Georgia v. *Grant*, 6 Wall. 241 (18 L. Ed. 848).

Cal. v. *Sou. Pac. Co.*, 157 U. S. 229-249 (39 L. Ed. 683).

Florida v. *Georgia*, 17 How. 478 (15 L. Ed. 181).

Grayson v. *Virginia*, 3 Dal. 320 (1 L. Ed. 619).
Penn. v. *Wheeling, etc., Bridge Co.*, 12 How. 518 (14 L. Ed. 249).

Virginia asserts a claim for money against West Virginia; with reference to a part thereof, she asserts it as trustee; with reference to another part she asserts it in her own right. These claims are derived from different sources. It seems utterly irreconcilable, with the principles of justice, that she should be permitted to uphold this demand upon any other doctrines than those which obtain in a court of equity in cases of like character when asserted by the individual citizen. The application of any other principle would involve every controversy between states in the mazes of uncertainty and doubt; and all interstate communication involving transactions resulting in litigation, in the utmost confusion and capriciousness. Virginia cannot enter this Court and invoke any other doctrines than those which prevail in cases of common right as recognized by courts of equity. This Court will not embarrass itself by settling this controversy upon any other grounds or by invoking any other considerations. It is simply a contest between two litigants in a court of equity, whose conduct must conform to its exaction and be measured and determined by its principles.

We here call the Court's attention to that part of the argument made by the late Honorable John G. Carlisle, upon the demurrer to the bill which relates to its multifariousness, and for the convenience of the Court we here copy it:

Mr. Carlisle's Argument.

"We confidently submit that the outline of the bill heretofore given and the exhibits made part of it show conclusively that it is multifarious, and that the demurrer ought to be sustained on that ground, if any good cause of action is shown over which this court has jurisdiction.

"Virginia suing in her own right upon a separate and independent cause of action alleged to belong exclusively to her is not the same party as Virginia suing as trustee upon a different cause of action for the use and benefit of others who have no interest in her claim.

Moreover, the state could not sue in equity in her own right in one bill, upon two causes of action so entirely separate and distinct from each other as the claim for money and property alleged to have been delivered to the defendant under the acts of the legislature, and the claim founded upon the compact for the defendant's just proportion of the old public debt, even if she had paid that debt and was entitled to contribution. The foundations of the two causes of action are wholly different, and they are of a wholly different nature and require different judgments or decrees. They involve different questions of law and fact, and a defense which would be good against one would be wholly inapplicable to the other."

"'Multifariousness,' says Foster, 'consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways—by misjoinder of plaintiffs: by misjoinder of defendants, and by misjoinder of grounds for equitable relief held by and against the same parties.'

"Foster, Fed Prac., sec. 71; Calvert on Parties, Book I, ch. VII.

"Story says:

> "'By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them: as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several of a distinct and independent nature against several defendants in the same bill.'
>
> "Story's Equity Pl., sec. 271.

"Again, it is stated by Story (section 533):

> "'The result of the principles to be extracted from the cases on this subject seems to be that where there is a common liability and a common interest, a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit.'

"In Daniel's Chancery Practice, page 335, it is said:

> "'It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct record.'

"In *Brown* v. *Guarantee Trust Co.* (128 U. S. 404) this Court said:

> "'To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must occur: first, the ground of suit must be different; second, each ground must be sufficient as stated to sustain a bill. *Bedsole* v. *Monroe*, 5 Iredell Eq. 313; *Larkins* v. *Biddle*, 21 Ala. 252; *Nail* v. *Mobley*, 9 Ga. 278; *Robinson* v. *Cross*, 22 Conn. 171.'

"See also *Shields* v. *Thomas*, 59 U. S. 253 (18 How.).

"In *Walker* v. *Powers*, 104 U. S. 245, a case analogous to the present, there was a misjoinder of plaintiffs and a misjoinder of causes of action. The opinion was delivered by Mr. Justice Miller, and the case of *Emals* v. *Emals*, 14 McArthur (N. J. Eq.) 114, and *Sawyer* v. *Noble*, 55 Me. 273, were cited and approved.

"See also *Dial* v. *Reynolds*, 96 U. S. 340.

"*Doggett, etc.*, v. *Florida R. R. Co.*, 99 U. S. 72.

"In *Salvidge* v. *Hyde*, Jac. 151 (5 Mad. 158), the vice-chancellor said:

> "'In order to determine whether a suit is multifarious, or, in other words, contains distinct matter, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the case, but whether the plaintiff's bill seeks relief in respect of matters which are, in their nature, separate and distinct.'

"In *Church* v. *Citizens' Street Railway Company*, 78 Fed. 529, the court said:

> "'Multifariousness consists in stating against the same party two or more independent causes of action in the same bill; or it may consist in stating one or

more causes of action against a portion of the defendants and another cause of action against another portion of the defendants.'

"In that action the plaintiffs, who had purchased stock in a corporation, attempted to secure relief for themselves in their own right on one cause of action, and also to secure relief against the same defendants for themselves and all other stockholders on another cause of action. The court held the bill multifarious.

"*Zeigler* v. *Lake City Elevated R. R. Co.*, 76 Fed. 662.

"*First National Bank* v. *Sioux City*, 75 Fed. 154.

"*Price, etc.*, v. *Coleman*, 21 Fed. 557, opinion by J. Grey.

"*Central Bank* v. *Fitzgerald et al.*, 94 Fed. 16.

"*Lewarne* v. *Mexican Internal Imp. Co.*, 38 Fed. 629.

"*Aetna Insurance Co.* v. *Smith*, 73 Fed. 318.

"In *Metropolitan Trust Co.* v. *Columbus & Hocking Ry. Co.*, 93 Fed. 689, Judge Taft said:

"'It is also true that a cause of action in favor of one in his own right is as distinct from a cause of action in favor of the same person as trustee as it is from that of a different person. And therefore that a defendant against whom a trustee attempted to unite in the same bill with a cause of action asserted by him as trustee a wholly distinct cause of action in his individual right might object on the ground of multifariousness. In the case before us the defendant railway company might therefore be heard to urge this defect in the bill, because it asks for an enforcement of two different liens held in different rights.'

"But the court held that the objection to the bill for multifariousness could not be taken by Zohorst and the Second National Bank, 'for,' said the court 'as to that issue made by the complainant as trustee the right is the same.' And again the court said: (p. 691):

"'Upon that issue the complainant as trustee and in its own right has precisely the same interest. And the union of the two causes of action does not embarrass

> Zohorst or the bank in the slightest; for as to them, the causes of action raised but one narrow question.'

"The difference between that case and the case at bar is obvious at a glance. In the case at bar the bill alleges two entirely separate and distinct causes of action arising out of two unconnected transactions, in one of which it alleges an interest in the plaintiff state, and in the other an interest as trustee, and thus presents two distinct series of issues to be investigated and decided. And, besides, it is perfectly clear that the State of Virginia has not the same interest in the cause of action alleged in her own right and in the one asserted as trustee; nor can the State of West Virginia make the same defense to both.

"In *Hall* v. *Fisher*, 20 Barb. (N. Y.), the plaintiff sued in its own name and also as administrator, alleging that he and his intestate were during the lifetime of the latter tenants in common, the intestate owning three-fourths and the plaintiff owning one-fourth of a lot of land; and his claim was that the defendants should account to him individually and to him as administrator for their share of rent and profits. The court held that the cause of action should have been separately stated. It said:

> "'How else can the defendant, if he has a defense of a different character as to each co-tenant, avail himself of such defense? He might in this case have one defense against the plaintiff as to his personal claim and another defense as to the interest whose rights he claims to represent as administrator. It cannot be regular for a plaintiff to include in the same action claims in his individual right and as administrator of another. It was never allowed at common law and is not sanctioned or allowed by any statute, not even the Code.'

"It is evident that the State of Virginia, having been by contract with her creditors discharged from all liability for the one-third of the old debt represented by the certificates, has no pecuniary interest whatever in the alleged claim against West Virginia for which she sues as trustee; and it will not be contended, we presume, that the owners of the unfunded one-third of the ante-war debt, whether it is represented by the canceled bonds held in trust by the

state or by the certificates, have any interest whatever in the claim of Virginia for money and property alleged to have been transferred to West Virginia under the acts of 1863. The unfunded one-third of the old bonds formerly held by the Virginia Commissioners of the Sinking Fund and the Literary Fund is in the same position as that belonging to the other creditors. Virginia has solemnly and repeatedly declared that she was not liable for the one-third, has refused to pay it or any part of it, and has canceled the bonds and issued to the Sinking Fund and Literary Fund the same kind of certificates issued to other creditors. The fact that the commissioners of the Sinking Fund and the Literary Fund are agencies of the state, would simply show that the state owed that part of the debt to herself. But the state has released herself from the obligation for one-third of the bonds originally held by these funds and has thereby withdrawn from them that proportion of the sum which she originally intended they should have. Unless, therefore, the two funds, as agencies of the state, now have a valid claim against West Virginia, their demands have been fully satisfied and extinguished. In any aspect, the claim is asserted by Virginia to recover from West Virginia for contribution on account of money which she (Virginia) has never paid.

"The claim against West Virginia under the compact cannot be divided into separate parts, so that Virginia can sue in her own right or for the commissioners of the Sinking Fund and the Literary Fund for the part represented by the certificates held by those two funds, and also sue as trustee for another part held by different parties. The claim is an entirety and the amount is to be ascertained *in solido*, in the manner provided by the compact, and is to be paid in the manner provided by the compact. Whatever the amount might be, it was all payable to Virginia herself, and not to the bondholders, who never had a cause of action against West Virginia, even if the state had been suable; and they cannot create a cause of action for their own benefit, in the name of the state, by the process of having Virginia transfer the indebtedness, or a part of it, to them by the enactment of statutes or the issue of certificates or otherwise, and then transferring it back to the state as trustee. But whether the

state is, or could be, legally a trustee, or whether, if she be legally a trustee, she could maintain an action in this cause in that capacity, makes no difference in the decision of the question of multifariousness, for the bill and exhibits show that for nearly, if not all, of the unfunded one-third of the debt she actually sues as trustee in this action and not otherwise; and that is sufficient to sustain the contention that there is a misjoinder of parties and a misjoinder of causes of action. Even, therefore, if it should be held that the state is suing in her own right for a judgment and recovery of the amount represented by the certificates held by the two funds and as trustee for the holders of the other certificates, it would furnish another substantial reason for holding the bill to be multifarious. Besides, it would show that there is a conflict between the personal interest of the trustee and the interests of the *cestuis que trust*, for whatever the trustee might receive in her own right in the distribution of the sum recovered would, to that extent, diminish the portions of the other beneficiaries; and it is a well established rule that plaintiffs whose interests are conflicting cannot unite in the same action—a rule which ought to be rigidly enforced, especially when one of the plaintiffs sues as trustee for the others, and consequently controls the entire proceeding.

" *Walker* v. *Powers*, 104 U. S. 245."

The argument of Mr. Carlisle, from which the foregoing extract is taken, is filed in this Court in a printed brief, and will be found also in West Va. Compilation, Vol. I., pp. 157-219.

It will be seen, therefore from the positive statements of the bill, that the plaintiff has sought to unite and assert in this suit at least four different demands; three whereof are claimed to be due to her in her own right, in which her creditors have no interest whatever, and as to which there must necessarily be a separate and distinct defense made by the defendant—a claim for which a decree must be entered, if entered at all, in favor of the Commonwealth of Virginia *alone*. Two of these demands asserted in her own right arise from an entirely different source from the other demand asserted in her own right, one of which is based upon statutes passed long after the adoption of the ordinance of Virginia and the constitution of West Virginia,

and in which the measure of relief to which Virginia is entitled, if she is entitled to any, must be determined upon very different grounds and considerations from those which must determine the liability of West Virginia, if any exists, with reference to the claim by Virginia asserted in the bill as trustee for her creditors; and the other of which claims asserted by Virginia in her own right, being that for contribution, is based upon purely equitable grounds, not necessarily predicated upon the right of accounting, and is of course a subject in which the creditors have not a particle of interest.

The Plaintiff's Suit Barred by Laches.

It seems to us that, under the circumstances of this case, a final and complete answer to the claim asserted by Virginia in her representative capacity as trustee, is her laches, or that of those whom she represents as a nominal plaintiff in this suit, especially as to that part of the bill which seeks an accounting as to the unfunded debt, and as to which Virginia herself disclaims all liability.

West Virginia was admitted into the Union on June 20, 1863, and any liability which existed against her with reference to any part of said debt existed and could have been asserted against her at that time. Instead of taking any steps looking to the settlement of West Virginia's just or equitable proportion of said debt, if any existed, Virginia in 1866, three years after West Virginia's admission into the Union, brought a suit in equity in this Court touching the boundaries of the two states, which terminated March 6, 1871, when the case was decided in favor of West Virginia.

On March 30, 1871, just twenty-four days after the decision of the case just mentioned, Virginia passed an act arbitrarily making a division of the debt herself, without consulting West Virginia, on the basis of two-thirds to herself and one-third to West Virginia, and without any authority issued the so-called West Virginia certificates for such one-third to the holders of the original debt, who, so far as the record in this case discloses, are still the owners of said certificates, Virginia canceling the bonds representing the old debt which had been surrendered to her by the holders thereof, and holding said bonds, as

alleged by her, in trust for the owners of said certificates. In 1879, with these certificates still outstanding, and so far as the record discloses still in the hands of the former owners of the bonds evidencing the original debt, Virginia passed another act relating to the whole debt, refunding the entire debt under the provisions of the act of 1879, and as to so much of the original debt as had not been funded under the act of March 30, 1871, Virginia under this act of 1879 issued certificates for the one-third of such unfunded debt, which certificates were to be taken and held as a full and absolute release of the State of Virginia from all liability on account of such certificates. This act of 1879 further provided that Virginia would

> "*negotiate, or aid the creditors holding all such certificates issued under this act or previous acts in negotiating with the State of West Virginia for an amicable settlement of the claims of such creditors against the State of West Virginia.*"

It will be seen from the foregoing that with this last act of 1879, and the other two acts passed subsequently, namely, the acts of 1882 and 1892, the provisions of which funded the entire debt, the holders of which so far as the record discloses were the holders of all the certificates, Virginia simply assumed to negotiate with West Virginia to secure the payment of these certificates by West Virginia to the holders thereof. The bill itself makes no claim for Virginia to any part of the unfunded debt represented by these certificates, held by third parties, but Virginia has simply constituted herself the holder thereof *in trust* for the creditors, the real claimants as to the part of the debt represented by these certificates, the owners and holders of said certificates being the owners and holders of the bonds evidencing the original debt of the State of Virginia created before and existing on January 1, 1861. An examination of the certificates issued under the acts of March 30, 1871 (R., pp. 83, 84), March 20, 1879 (R., p. 36), and February 14, 1882 (R., pp. 43-4), specifically designates and identifies the bond or bonds representing the former debt, and each certificate shows which of the original bonds was surrendered, the amount thereof assumed by Virginia, and the balance thereof not assumed by Virginia, but for the payment of which the holder of the

original bond, being the holder of the certificate, was referred by Virginia to West Virginia. Therefore, every certificate issued by Virginia was surrendered to the owner of the bond, and when Virginia funded any bond upon the two-thirds basis assumed by her she delivered to the holder of the old bond in lieu thereof a new bond issued by Virginia for two-thirds of the original debt and a certificate for the other one-third; or, in the language of the certificate, the balance of such bond, designating the amount, "to be accounted for by West Virginia." So, at the time of the delivery of these certificates and new bonds under these various acts, the holder of the original debt was then also the holder of the new bond for two-thirds of the original debt and was at the same time the holder of the certificate representing the other one-third. Such owner, so far as the record shows, is still the holder of the certificates, and was such holder at the time the acts of 1871, 1879, 1882 and 1892 were enacted and put into operation.

The record fails to disclose any change of ownership of these certificates. If such change of ownership did take place by sale or transfer to other parties, there is no allegation to that effect, nor is there any proof showing such sale or transfer.

We say that the owners and holders of the original bonds evidencing the debt of Virginia created prior to and existing on January 1, 1861, are still the owners and holders of the new bonds issued by Virginia and the certificates for the residue, upon the well recognized principle of law that a fact once shown to exist is presumed to continue to exist until the contrary is shown.

1 Greenl. Ev., §41.

McKenzie v. *Stevenson*, 19 Ala. 691.

In *St. Louis A. & T. H. R. Co.* v. *Eggman*, 161 Ill. 155 (43 N. E. 620), objection was made to the introduction in evidence of an ordinance, on the ground that it was not shown to be in force at the time of the accident in question. The court, overruling this objection, says:

> "It having been shown that the ordinances were passed prior to the day on which deceased was killed, the presumption is that they were still in force on that date; for when a fact or state of things is once shown

> to exist the presumption is that the fact or state of things continues to exist as before until the contrary is shown, or until a different presumption is raised."

The authorities in support of this proposition are numerous, and there are none to the contrary that we have been able to discover.

Could the holders and owners of these certificates retain them for a period of thirty-five years, and then arrange with Virginia to bring suit for their payment in her name against West Virginia and obtain a decree, even if such a suit was authorized under the constitution of the United States? Certainly not.

Laches is peculiarly a doctrine of equity. Mr. Pomeroy, in the third edition of his great work, Vol. 1, §418, discussing the maxim, "Equity aids the vigilant, not those who slumber on their rights," says:

> "The principle embodied in this maxim, the original form of which is, *Vigilantibus non dormientibus aequitas subvenit*, operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs, than as being the source of any particular and distinctive doctrines of the jurisprudence. Indeed in some of its applications it may properly be regarded as a special form of the yet more general principle, He who seeks equity must do equity. The principle thus used as a practical rule controlling and restricting the award of reliefs is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory period of limitation. It is invoked for this purpose in suits for injunction, suits to obtain remedy against fraud, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee."

Discussing the *rationale* of the doctrine of laches, a recent work declares:

> "The rule that the enforcement of a right may be barred by laches is an application of the maxim *vigi-*

lantibus, non dormientibus, subvenit leges. Thus it has been declared with general approval that only conscience, good faith and reasonable diligence can call a court of equity into activity, and that stale demands will not be aided where the party has slept upon his rights and acquiesced for a great length of time. The doctrine is based on grounds of public policy and its aim is the discouragement, for the peace and repose of society, of stale and antiquated demands."

18 Am. & Eng. Enc. L. 97, citing the authorities, both English and American.

Another recent and reputable work says:

"Long delay in asserting a demand may defeat the remedy by raising a presumption of payment or satisfaction. Delay is always a suspicious circumstance, and if prolonged may create a presumption against the validity of a right which might otherwise be deemed established."

16 Cyc. 160.

In *Piatt* v. *Vattier*, 9 Pet. (34 U. S.) 405, Mr. Justice Story, in refusing relief in that case, and especially in the opinion at page 416, says:

"And we are of opinion that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit independently of the statute. There has been a clear adverse possession of thirty years without the acknowledgment of any equity or trust estate in Bartle; and no circumstances are stated in the bill or shown in the evidence which overcome the decisive influence of such an adverse possession. The established doctrine—or, as Lord Redesdale phrased it, in *Hovenden* v. *Annesley*, 2 Sch. & Lef. 637, 638, 'the law of courts of equity'—from its being a rule adopted by those courts independently of any positive legislative limitations, is that it will not entertain stale demands. Lord Camden, in *Smith* v. *Clay*, 3 Brown's Ch. Rep. 640, note, stated it in a very pointed manner. 'A court of equity,' said he 'which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his

> rights or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing: laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation of suit in this court.' The same doctrine has been repeatedly recognized in the British courts, as will abundantly appear from the cases already cited, as well as from the great case of *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 1. It has also repeatedly received the sanction of the American courts, and was largely discussed in *Kane* v. *Bloodgood*, 7 Johns. Ch. Rep. 93, and *Decouche* v. *Saratiere*, 3 Johns. Ch. Rep. 190. And it has been acted on in the fullest manner by this court, especially in the cases of *Prevost* v. *Gratz*, 6 Wheat. 481 (5 Cond. Rep. 142); *Hughes* v. *Edwards*, 9 Wheat. 489 (5 Cond. 648); *Willison* v. *Matthews*, 3 Peters 44, and *Miller* v. *M'Intire*, 6 Peters 61, 66."

In *Goddin* v. *Kimmel*, 99 U. S. 201, which was a suit brought by the creditors of a decedent for the recovery of real estate and personal property, and seeking to have the same subjected to the payment of the debts of the decedent, the syllabus of the case is as follows:

> "In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law; in many cases they act upon the analogy of the limitations at law: but even where there is no such statute governing the case, a defense founded upon the lapse of time and the staleness of the claim is available in equity where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."

The court in its opinion in this case says:

> "There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim where no statute of limitations governs the case. Such courts in such cases often act upon their own inherent doctrine of discouraging for the peace of society antiquated demands by refusing to interfere where there has been gross laches in prosecuting the claim, or long

acquiescence in the assertion of adverse rights. *Badger* v. *Badger*, 2 Cliff. 154; *Roberts* v. *Tanstall*, 4 Hare 269; *Stearns* v. *Page*, 7 How. 819."

The doctrine here announced is supported by an unbroken line of authorities throughout the various state courts of the Union, among which appear those of Virginia and West Virginia.

In *Hatcher* v. *Hall*, 77 Va. 573, we find in point 1 of the syllabus the following as a statement of the law regarding laches:

> "It is an inherent doctrine of courts of equity to refuse relief where there has been gross laches in prosecuting rights or long and unreasonable acquiescence in the assertion of adverse rights. This doctrine is founded on considerations of natural justice and public policy, and is always firmly enforced, especially where the immediate parties to the transaction are dead."

It will be observed that the doctrine here announced has its foundation in want of diligence and the policy of discouraging by courts of equity the assertion of stale demands. It is especially applicable, of course, where all the parties to the transaction are dead. The reason of this is the difficulty of establishing a claim to the satisfaction of the court in the absence of satisfactory sources as to evidence. The doctrine is enforced in other cases where the parties may all be living. Here, the parties claiming the right never sought the aid of Virginia to bring this suit against West Virginia in her own name until after the lapse of about thirty-five years. Neither did the creditors apply direct to West Virginia for payment. Those persons who were familiar with the territory of the two states at the time of the formation of the new state, who knew its value as well as the value of the personal estate in both states in 1863 and in 1871, also those who knew the extent of the loss suffered by both states as an incident of the civil war, the officers of the government who were thoroughly cognizant of the situation in this regard as to both states, are all dead; in view of which the obtainment of evidence necessary to fix an equitable basis upon which to determine West Virginia's liability, if any existed, is no longer accessible. Furthermore, the witnesses necessary to fix the value or values of the property alleged to have been transferred by Virginia to West Virginia are likewise dead, and the Court cannot obtain any

reliable or satisfactory evidence as to what property was turned over by Virginia to West Virginia, to recover which this suit is in part brought; nor can the evidence as to its value be obtained.

The laches of these creditors suing through Virginia, as well as that imputable to Virginia herself, is absolutely inexcusable. No legal excuse for such laches is offered in the bill or in any manner attempted to be shown. It seems to us that this delay to assert these claims in the name of Virginia, both those demanded in her representative capacity and those in her own right, has been so long continued and is so inexcusably gross as to afford evidence of the injustice of the claim, if not of its actual abandonment on the part of the State of Virginia as well as the creditors.

It is well settled that delay in the assertion of a right, when it does not operate as a statutory bar, may operate in equity as evidence of assent, acquiescence or waiver unless satisfactorily explained.

Kelly v. *McQuinn,* 42 W. Va. 774.
Pusey v. *Gardner,* 21 W. Va. 469.
Bryant v. *Glover,* 42 W. Va. 10.
Nelson v. *Carrington,* 4 Munf. 332.
Coles v. *Ballard,* 78 Va. 139-147.
Eubank v. *Barnes,* 93 Va. 153.

In *Jones* v. *Perkins,* 76 Fed. 82, the second point of the syllabus is as follows:

> "To support the defense of laches it need not be shown that defendant has been injured by the delay."

In the course of the opinion, we find the following:

> "It is contended on behalf of the complainant in the case at bar that it must appear to the court, where laches is urged as a ground of defense, that detriment has come to defendant from the delay; that his position has been changed to his injury, or that he has been deprived of evidence which an earlier prosecution of the suit would have enabled him to obtain. This position is not tenable. There are cases where a longer delay than is here complained of has been excused by circumstances, where a court could clearly say that it caused no prejudice to the defendant, but these are exceptions.

> The doctrine of laches as a defense presumes that the lapse of time is constantly destroying the evidence of rights, and that the death of witnesses and the loss of documentary evidence is its ordinary consequence."

From the case of *Speidell* v. *Henrici*, 15 Fed. 753, the decree in which was affirmed in 100 U. S. 377, we take the following:

> "A suitor in equity is required to be 'prompt, eager, and ready' in the pursuit of his rights. Diligence is an essential condition of equitable relief, and unexplained negligence is never encouraged. 'Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive and does nothing. Laches and negligence are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court.' *Smith* v. *Clay*, Amb. 645, quoted with approval in *Brown* v. *County of B. Vista*, 95 U. S. 160.
>
> "So, also, says Mr. Justice Swayne in the case last referred to: 'The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded.'
>
> "And again: 'Courts of equity refuse to interfere after a considerable lapse of time, for considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *vigilantibus et non dormientibus jura subserviunt*.' 1 Story Eq. Jur., §529."

May the doctrine of laches be imputed to a state? We find in the case of *Atty. Gen.* v. *Central R. Co.*, 68 N. J. Eq. 198 (59 Atl. 348),

in the opinion at page 360 of the reporter, the Court applying the doctrine of laches to the demand of a state, using this language:

> "The equitable rules relating to the effect of laches and acquiescence are enforced against the state when it is a suitor for equitable relief, as well as against private suitors. *Atty. Gen.* v. *Del. & B. B. R. Co.*, 27 N. J. Eq. 1, and cases cited at page 27."

So we find in *In re Hepburn*, 3 Bland (Md.) 95, the Court holding that laches is available as a defense against the state.

There are a number of cases decided by this Court holding that laches is not imputable to the government: *Armstrong* v. *Morrill*, 14 Wall. 120; *Lindsey* v. *Miller*, 6 Pet. 666; *U. S.* v. *Dalles Military Road Co.*, 140 U. S. 599; *U. S.* v. *Thompson*, 98 U. S. 486; *Redfoed* v. *Parts*, 132 U. S. 239. Yet this Court holds that the government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there.

> *Cook* v. *U. S.*, 91 U. S. 389. See also *French Republic* v. *Springs Co.*, 191 U. S. 427, 438.

So, too, when the government is only a formal party, and the suit is brought in its name to enforce the rights of individuals, as in the case at bar, and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case and the litigation was carried on in the name, as in fact, for the benefit of private parties.

> *U. S.* v. *Navigation Co.*, 142 U. S. 510, 538.
> *U. S.* v. *Beebe*, 127 U. S. 338.
> *Moran* v. *Horsky*, 178 U. S. 205, 214.
> *U. S.* v. *Am. Bell Tel. Co.*, 167 U. S. 224, 265.
> *McNutt* v. *Bland*, 2 How. 9.

So where the government is suing for the use and benefit of individuals or for the prosecution of private and proprietary instead of public or governmental rights, it is clear that it is not entitled to the exemption of *nullum tempus* and that the ordinary rule of laches applies in full force.

French Republic v. *Springs Co.*, 191 U. S. 427, 438.
Maryland v. *Baldwin*, 112 U. S. 490.
Curtner v. *U. S.*, 149 U. S. 662.
U. S. v. *Beebe*, 127 U. S. 338.
U. S. v. *Navigation Co.*, 142 U. S. 510, 538.

So it is held in *Miller* v. *State, use, etc.*, 38 Ala. 600, that while the statute of limitations does not apply to actions by the state, still it does extend to a suit brought in the name of the state for the use of a particular township to recover lands which constitute a part of a certain section.

In view of the well settled doctrine of courts of equity, and which this Court always applies in proper cases, that stale demands are not countenanced and that gross neglect or inexcusable delay in bringing suit to enforce an equitable claim will constitute a bar even to an otherwise meritorious demand, there can be no doubt that Virginia can not maintain this suit so far as it seeks to establish a claim against West Virginia with reference to the unfunded debt held by third parties. This ground of defense is based upon the fact that Virginia is not asserting this claim in her own right but only in her representative capacity as trustee, and that if a decree as to this part of the case can be obtained no part of it can enure to her benefit. Indeed, she asserts this in her bill, alleging that whatever is obtained in this suit is payable to the holders of these certificates. This is none other than an individual claim, and not a case involving the rights of Virginia, either pecuniary or otherwise. In fact, she declined to bring any suit except at the special request of the owners and holders of these certificates. There is no reason or excuse for this delay of thirty-five years on the part of the owners of these certificates in exerting an effort to have West Virginia pay it. It does not answer the charge of laches to say that the holders of these certificates could maintain no suit. They could not maintain a suit against Virginia. They could have been diligent in asking West Virginia to pay, and in case of refusal, in arranging to have Virginia bring this suit long before it was brought with reference to this unfunded debt, the payment of which is to enure to them. But we deny the right of Virginia to sue for the creditors. They offer no excuse for this delay.

If West Virginia was liable for the payment of any part of said public debt, she has been liable since her admission into the Union, June 20, 1863, forty-three years before the bringing of this suit.

Why this long delay? The only just inference is that they did not regard these claims as constituting a valid demand against West Virginia. Indeed, they evidently knew that they could not be asserted against West Virginia; and the institution of this suit on the account of the holders of these certificates was a mere speculative matter in which Virginia would have no part except at their request and with the understanding that she should incur no costs or expenses in such suit. This long delay certainly affords conclusive evidence against the justice of the demand made by these holders through and in the name of Virginia as plaintiff against this defendant, and was evidently undertaken for the purpose, if possible, of constraining West Virginia by means of this suit to concede their inequitable demand and settle with them for these certificates, notwithstanding their lack of inherent justice and right, and in this way possibly create a demand for these certificates of a fictitious character, and speculate upon them in the markets.

No other construction can be placed upon the long delay of the holders of these certificates in taking steps to bring suit. Virginia could have brought this suit long before she did if she had a right to maintain it, with the same show of right as she could do in 1906.

We therefore confidently insist that, if there were no other ground of defense in this case as to the certificates issued in 1871, that of the laches of the holders thereof is an ample and complete defense.

PART II.

On Exceptions of the Plaintiff and the Defendant to the Report of the Special Master.

In this part of the brief for West Virginia we will consider the facts of the case as shown by the record in connection with the exceptions filed by the plaintiff and the defendant to the report of Hon. Charles E. Littlefield, the Special Master. Questions of law will be argued incidently only. For convenience, we will take up the several paragraphs of the decree of reference in the order they are set out in the report of the Special Master, who will hereafter be referred to as the "Master."

PARAGRAPH I. OF THE DECREE.

> "1. *The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specially how and in what form the same was evidenced, by what authority of law and for what purpose the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.*"

No exceptions were filed to the report of the Master under this paragraph by West Virginia. Virginia did file an exception to the finding of the Master as follows:

> "For errors of law apparent in the record, complainant respectfully excepts to the statements contained in the Master's report in regard to the Literary Fund, save and except so far as they show the creation, existence, and amount of such fund, and especially does complainant except to the Master's conclusions that the Board of the Literary Fund (a corporation) had no right to sue and be sued and that the fund was the unconditional property of the State and subject to its control and

ownership, while the said fund was under the law held and controlled by the board and the State in trust for educational purposes alone. See Master's Report, pp. 6 to 30, and acts in Appendix to Record, pp. 205-208."

There is no dispute of fact between the parties as to the report of the Master under this paragraph. The only dispute refers to a question of law. Virginia contended originally that the three items known as the Sinking Fund of $1,369,243.92, the Board of Public Works Fund of $150,895.90 and the Literary Fund of $1,116,843.35 were parts of the public debt of the Commonwealth of Virginia on the first day of January, 1861. The Master found against her contentions. Virginia excepted only to the report of the Master in his conclusion as to the Literary Fund, thereby conceding that the other two funds mentioned were no part of the public debt of Virginia. The Master argues the question at some length in his report, and decided it as he does therein on the ground that Virginia on the first day of January, 1861, was the absolute owner of the bonds in the Literary Fund, as well as those in the Sinking Fund, and that they were not outstanding in the hands of any one who could assert them against the state. In other words, the state could not owe a debt evidenced by said bonds and at the same time be the absolute owner of such bonds with power to do with them as she pleased. It seems to be clearly shown that these funds were simply methods of bookkeeping for the convenience of the state in the administration of her fiscal affairs. It was immaterial whether these funds were fixed and defined by the constitution or by statute. The fact remains that it was absolutely within the power of the state at any time she so willed to destroy these evidences of debt and declare the accounts closed. The funds that Virginia paid for these evidences of debt had been raised by some form of taxation from the people and property of the united state, and in law there can be no reasonable dispute on the question whether or not these bonds had been legally paid and canceled. The officers of the Board of the Literary Fund were by the law the chief executive officers of Virginia. No individuals had any rights or powers in connection therewith. We do not deem it improper to say at this point that the counsel representing Virginia in the argument before the

Master did not really deny the position here taken, and we think that the Master could truthfully have said that his conclusions were conceded by the Attorney General then in office and representing the State of Virginia.

PARAGRAPH II. OF DECREE.

"2. The extent and assessed valuation of the territory of Virginia and of West Virginia, June 20, 1863, and the population thereof, with and without slaves, separately."

There is no dispute as to any question of fact under this paragraph and no exceptions to the findings of the Master by either the plaintiff or the defendant.

We respectfully call the Court's attention to the alternative findings under this paragraph, which were made at the request of the defendant. (Master's Rep. pp. 37-8).

PARAGRAPH III. OF DECREE.

"3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

The plaintiff and the defendant have each filed numerous exceptions to the findings of the Master under this paragraph. For convenience, we will first take up the exceptions filed by West Virginia to the conclusions of the Master under this paragraph, and then we will discuss the exceptions of Virginia thereto.

Exceptions of West Virginia.

Kanawha River Turnpike and Kanawha River Improvements.

Items 10, 11, 12, 13 and 14 (Record, p. 373) were for the following sums:

Kanawha Turnpike	$152,130.54
Kanawha Turnpike	2,593.92
Kanawha Turnpike	7,189.65
Kanawha Turnpike	80,955.28
Kanawha River Improvements	59,572.36
Total	$302,902.15

These were found to be expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia. There is no real dispute as to the facts in relation to this sum, as understood by us.

There is one matter of fact in relation to the alternative finding of the Master, found at the bottom of page 70 of his report, to which we will refer later.

We differ from the Master and except to his findings on the ground that the Commonwealth of Virginia, after expending these sums of money for the purposes set out on the Kanawha River Improvements and the construction of the Kanawha Turnpike, did by her act of March 16, 1832 (App. p. 86), *sell and transfer to a private corporation* the turnpike and the river on which, and for the improvement of which, this money was expended: and the turnpike and the river so far as travel and navigation thereon were concerned, became the private property of this private corporation by reason of such sale and transfer by the Commonwealth, and for a period of more than twenty-five years prior to the first day of January, 1861, the only interest that the State of Virginia had in the subject matter of such expenditure was that of a stockholder of this private corporation. We do not agree with the argument of the Master and of Virginia that it was immaterial what the commonwealth did before the first day of January, 1861, with the subject created by such expenditure. The principle would be the same if the commonwealth had sold the turnpike for a money consideration and had made a large profit thereon. She could not have more effectually dispossessed herself of the power and control thereof than she did when she sold this turnpike and these river improvements for ten thousand shares of stock in the private corporation, to which she transferred this property. The title to such

turnpike and to such improvements still remained in the James River and Kanawha Company, *a private corporation.*

That this corporation was a private one is conclusively determined by the decision of the Supreme Court of Virginia in the case of *James River and Kanawha Company* v. *Early*, 13 Gratt. 541. This decision was rendered in 1856, and without any thought or imaginary possibility of any future difficulty in relation to this matter. The Supreme Court of Virginia specifically held in that case that the fact, that the state owned a large interest in the stock of the Company, did not in the slightest degree release it from liability for neglect of its officers, and that the rights of the state therein were no more than those of any other stockholder.

Conceding for the purpose of this argument only, that the original expenditure made by the commonwealth through the agency of the James River Company, was an expenditure within the meaning of the decree and the ordinance, we submit that this action of Virginia in selling this turnpike and these improvements should eliminate this whole item from this account. Can it be presumed for a moment that if the commonwealth, after paying $10,000 for the land on which the asylum at Weston was afterwards built, had decided not to build thereon and had sold this land for either money or stock in some private corporation or for other thing of value, she then could have charged under this head to West Virginia as an expenditure the amount she had originally paid for such piece of land? Let us take another example: If the commonwealth had sold, prior to the first day of January, 1861, the Covington and Ohio Railroad, so far as it had been completed, for money or other thing of value, could the sum exepended thereon by Virginia have then been included in this account as a state expenditure within the present limits of West Virginia? Is it not an insult to the intelligence of the able men, including Senator Carlisle, Senator Vanwinkle, Senator Boreman, and the many other men of ability who composed the convention which passed the Ordinance of August 20, 1861, to think that they intended to include under the word "state expenditures" property which had been built, constructed or purchased by the state, and then sold before the date of the separation to an individual or private company?

In the original account filed by Virginia before the Master in this cause is the following item:

"Interest on bonds of the City of Wheeling, $15,115.64."

This item was set up by Virginia and seriously claimed as an expenditure within the limits of the State of West Virginia during the period contemplated by the ordinance, because it had been paid by the commonwealth as interest on some bonds guaranteed by her, which bonds were made by the City of Wheeling, a municipal corporation. No doubt Virginia would be now claiming this expenditure as such if the defendant had not discovered and shown to the satisfaction of the counsel of Virginia, that in the year 1866 this sum with interest had been fully and completely repaid to the State of Virginia by the City of Wheeling. Then the counsel of Virginia withdrew this item from the account. While West Virginia never admitted that a loan to a municipal corporation was a state expenditure within the meaning of the decree or ordinance; but if Virginia desires to be consistent with her claim with reference to the Kanawha River Turnpike and Kanawha River Improvements, she should also have insisted that this amount originally loaned by the commonwealth to the city of Wheeling should be included in this account.

The James River and Kanawha Company kept the control of the Kanawha Turnpike and of the improvements on the river after the first of January, 1861, and also after the separation of the states. All that West Virginia obtained therein was by reason of the stock ownership of Virginia in this private corporation. The ownership of the property of the James River and Kanawha Company remained in the corporation, and the ownership never was invested in West Virginia at all.

By reason of the fact that the Chesapeake and Ohio railway paralleled this turnpike, all its value to the company was taken away. This happened after the Civil War, however.

Record, page 820-A, shows defendant's Exhibit "G-1." On page 11 of that exhibit it will be seen that there was expended by the State of Virginia the sum of $1,216,666.30 on the James River Canal, Blue Ridge Canal, and Kanawha Road and River, which construction work

and improvements were turned over to the James River and Kanawha Company, a private corporation, under the act of March 16, 1832, in return for 10,000 shares of stock of the par value of $100 each in said James River and Kanawha Company. It will be further seen that the State of Virginia thereafter subscribed for 20,000 shares of stock in the same company and paid the sum of $2,000,000 in money therefor. It shows the good faith of Virginia in selling these properties to the private company. It shows that she received what she believed to be the real value of these improvements in 1832. She certainly regarded this stock as a good *investment*, or she would not have paid $2,000,000 in money for 20,000 shares more of it.

In addition to this purchase of 20,000 shares of stock in this company, for which the money was paid, the same record shows that the state loaned to this company large sums of money. The state also guaranteed large amounts of the bonds of this company, which bonds the state afterwards assumed as an original proposition by the act of March 23, 1860, and they are now included in the total of the debt set up under the first paragraph of the decree in this cause. In return for assuming these bonds as an original obligation and for the loans made by the state directly to the company, she received 72,000 shares of the stock of the company.

The Master speaks (Rep., p. 42), of the construction of the provision of the West Virginia constitution and the Wheeling ordinance relating to West Virginia's assumption of a just proportion of the debt, so as to produce an equitable result. If there is any place requiring such application anywhere in this case, it surely is here. Can it be called equitable in any sense of the word to charge against West Virginia as a "state expenditure" money which the old state spent in building a turnpike, which turnpike the old state, *before the separation of the two states*, sells and receives the proceeds? It seems rather shocking to one's equitable sense to propose such a thing. It also seems rather shocking for a plaintiff to ask a court of equity, a court of conscience, to grant such relief. If this suit had been brought solely for the purpose of recovering that one series of items, would not a court of equity have dismissed the suit upon demurrer? Assuredly it would.

On page 70 of this report, under the head "Alternative Finding," the Master says: "There is nothing in the record to show whether this transfer was actually made." He meant whether the property of the James River Company, including this Kanawha Turnpike and these improvements of the Kanawha River, were ever actually transferred to the James River and Kanawha Company. The case set out above, of *James River and Kanawha Company v. Early*, 13 Gratt. 541, and the case of *Higginbotham's Executor* v. *Commonwealth*, 25 Gratt. 627, both quoted in the Master's report, the reports of the Board of Public Works, the reports of the James River Company, numerous acts of the legislature of Virginia, which are included in the appendix, pages 86 to 112, show conclusively and prove absolutely that the transfer was duly made under the provisions of the act of March 16, 1832. Moreover the Exhibit "G-1" (R., p. 820-A), agreed to by the accountants of the plaintiff and defendant, shows conclusively that the transfer was made by the State of Virginia of all the properties above mentioned to the James River and Kanawha Company according to the provisions of the said act of March 16, 1832.

Brandonville, Kingwood and Evansville Road $10,595,73; Clarksburg & Buchanan Turnpike $19,259.36; and Kingwood and West Union Turnpike $18,140.61.

These three items, which are numbered 25, 28 and 35 in the report and record, were found to be state expenditures by the Master, to which finding West Virginia excepts. It is a question of law, whether or not they shall be charged to West Virginia. It is agreed that each one of these was a turnpike company duly chartered by the commonwealth, that the commonwealth was a stockholder in each one, and that each was a private corporation and managed by a board of directors; and while in this condition the commonwealth generously appropriated the above sums, which were expended upon the property of these private corporations. The state had no more title and no more rights to the property of the corporation after such expenditure than it had before. Under the acts appropriating the money it would appear that these sums were gifts to these corporations. If these gifts had been made to individuals and they then had expended the money

within the limits of West Virginia, would it be claimed for a moment that such gifts came within the purview of the decree or ordinance? *Can any gift to a private individual or corporation be a "state expenditure"?* We think not. If Virginia had given this money to a corporation resident of Maryland, or of Virginia itself, and such corporation had chosen to expend the same on a public utility project, such as a turnpike, railroad or canal within what are now the limits of West Virginia, would it have been a "state expenditure" in the meaning of this ordinance? Clearly not.

In the first account filed by Virginia before the Master (R., p. 373, Item 17) she claimed the sum of $7,882.92, which she had paid for stock in a Maryland corporation. This Maryland corporation had built a piece of road in the southwest corner of Garrett county, Maryland, which connected with some Virginia roads at each end. These Virginia roads were built and owned by Virginia. On reflection, at the hearing before the Master, counsel of Virginia asked leave to withdraw this item, and did so. Was it not as reasonable to charge this sum to West Virginia as the one under consideration?

It must not be forgotten that not a single one of these three turnpikes, built by private corporations, were open to free travel by the public, as turnpikes now are almost universally within the United States. Every such corporation in the state then charged and collected tolls on each and every one of these roads, as well as tolls on each and every one of the navigable rivers; and some of the road companies paid good dividends on the investment of the moneys therein, as shown by the record in this cause. Can a gift by the state, however generous might have been the impulse of the giver, which simply increased the toll collecting value of the property of a private corporation, and which did not increase the state's power or rights or financial interest therein, be called a "state expenditure," any more than the purchase of stock in that private corporation by the state could be called a state expenditure? Certainly not; but this last question will be elsewhere discussed under the exceptions of Virginia to this same paragraph.

Item 55, Surveys—$60,873.19.

This item is discussed under Paragraph III., page 75, and Paragraph IV., page 134, of the Master's report. It was agreed by the accountants that under the head of "Surveys" there was spent an aggregate of $250,206.56. It was claimed by the defendant that neither this sum of money nor any part thereof could be both a state expenditure under Paragraph III. and an item of the ordinary expenses of the state government under Paragraph IV. *The Master has seen fit to hold that it can be both;* that is to say, that such part thereof as can be shown to have been expended in the territory now West Virginia should be charged as a state expenditure, and such part as could not be shown to have been expended at any particular place should be charged as an ordinary expense of the state government. It is admitted that the total sum was expended as a part of the expenses of a state officer performing certain duties prescribed by a state statute. The Master said: "It is a narrow and close question." (Report, p. 76). It does not seem to us to be either. When we take into consideration the fact that in every other instance all the salaries of state officers, without exception, such as judges and the executive officers, and the cost of the work done by them and the expenses incurred by them in the performance of their duties, are all charged in this report as ordinary expenses of the state government, we can see no reason for this exception. In fact, it seems to us very clear that this sum of $250,206.56 is properly chargeable as a whole to the ordinary expenses of the state government; just as the other salaries and expenses of office of state officers are charged, as stated above.

Therefore, we earnestly contend that the said sum of $60,873.19, allowed as a state expenditure under this Paragraph, should be stricken out, and that there should be charged to ordinary expenses of the state government, under Paragraph IV. on page 134 of the Master's report, the said total sum of $250,206.56.

Item 150, Loan to the Town of Bath—$2500.

If it were not for the fact that there is a principle concerned in this small item we would not except to the finding of the Master. This

was a loan to the Trustees of the Town of Bath, and they were compelled to give bond with good security, payable to an agency of the state, to wit, the Board of Public Works, for the punctual payment of the interest annually to the state on this loan. The Master finds that this interest was paid to the state and that the auditor of the state described it as a loan and carried it on the books of the state as such. We do not agree with the Master that this action on the part of the State of Virginia in so carrying it has no weight, and we respectfully submit that the auditor's books quoted by the Master and the action of the state from the time of the loan up to the separation of the two states, and the action of the trustees of the Town of Bath in paying the interest thereon annually, conclusively fixes its status as a loan, and therefore is no charge against West Virginia. Further on under this paragraph we will discuss the question whether a loan by the state can possibly come under the head of "state expenditures." The Master holds that it cannot.

This *loan* is also recognized by the trustees of the Berkeley Springs, in their report to the legislature of West Virginia, 1869, which report is printed in the back part of the House Journal of the West Virginia Legislature of 1869, along with reports of state officers, other boards, etc. (What is now known as the town of Berkeley Springs, in Morgan county, West Virginia, was formerly known as the town of Bath.) This particular report of 1869 is a comprehensive one, and one of the signers thereto is no less a famous personage than David H. Strother, known in literature by his pen-name of "Porte Crayon." It is pointed out in this report (p. 4) that "the Berkeley Springs and adjacent property do not belong to the state of Virginia or to West Virginia (as its successor)." On page 3, in discussing the finances of the property, the report says:

> "That there were old debts standing against the property * * * * to wit:
>
> "To the estate of Philip C. Pendleton, deceased, $2,000, money borrowed for the purpose of building a row of baths, with a large pool attached, for the use of the ladies.
>
> To the *Board of Public Works, Richmond, Virginia*, $2,500, money borrowed for the purpose of constructing

a graded road from Sir John's Station to the Springs." (Sir John's Station is a station on the Baltimore & Ohio Railroad.')

Thus, the law authorizing the loan, the auditor of Virginia's books, the creditor, and the books of the trustees, the debtors, *all recognize it as a loan.*

This concludes the discussion of the exceptions of West Virginia to the Master's report so far as the third paragraph is concerned.

Exceptions of Virginia under Paragraph III.

Virginia specifically excepts under Paragraph III., only to the finding of the Master that certain moneys paid by her for stock in turnpike, bridge and railroad companies, which were private corporations, and that certain moneys loaned by her to such corporations, are not allowed as state expenditures within the meaning of the decree and the ordinance. These items are divided as follows, as shown on pages 375, 376 and 377 of the record:

Items 57 to 65, inclusive, Bridge Companies	$78,412.50
Items 66 to 69, inclusive, Navigation Companies, aggregating	210,500.00
Items 70 to 147, inclusive, Turnpike Companies, aggregating	803,555.83
Item 6 (R., p. 372) Berryville and Charles Town Turnpike Company	11,932.52
The total aggregate of these items	$1,104,400.85

All these items can, to a certain extent, be discussed at the same time, as the same general principle of stockholding investment runs through them all.

Item 6, Berryville & Charles Town Turnpike Company, $11,932.52, in some respects differs from the others, and Item 66, Coal River Navigation Company, $96,000 (R. p. 375), is somewhat like the principle in Item 6, and so far as they are alike will be discussed together.

The Berryville and Charles Town Turnpike Company was a private corporation, chartered by the State of Virginia. It was duly author-

ized to and did construct a turnpike from Berryville, Clark county, Virginia, to Charles Town, Jefferson county, now in West Virginia. There is now of this road in the present limits of West Virginia 58⅓ per cent. Virginia subscribed and paid for stock in this company of the par value of $20,455.74. The special fact in relation to this corporation is that it gave a deed of trust on its property, which was this turnpike, to secure loans to the company. This deed of trust or mortgage was foreclosed in the year 1858, and the physical property of the company sold. The purchaser at this sale was the State of Virginia, and the price paid was $7,236.97. West Virginia admits her liability for 58⅓ per cent of this last sum, but denies any liability whatever as to the stock subscription. This reason is in addition to the other reasons hereinafter given, which will apply to all stock subscriptions. There is no dispute between the parties as to the facts here related (R., pp. 454, 455).

The case of the Coal River Navigation Company is somewhat like this. This is item 66 on page 375 of the Record, and is included by Virginia in her exception to the finding of the Master in relation to Items 66 to 69, inclusive, aggregating $210,500. This particular item is for the sum of $96,000. This is another instance where the state bought stock of a private corporation, in this particular case of the par value of $96,000. The corporation, on July 30, 1858, executed a mortgage or deed of trust on the property of the company to secure a large amount of indebtedness set out therein. The company failed to pay the debts so secured, and the trustees named therein, under the authority thereof, on October 25, 1865, sold all the property of this company to private persons. (R., pp. 990, 1003.) We thus see, as to these two corporations, on the first day of January, 1861, the State of Virginia was not even a stockholder in either. The corporations had in a legal way disposed of their entire properties, and all the state had was stock in a defunct corporation, and the corporations still owed large debts. West Virginia did not, under the laws of nations, nor under the acts of Virginia transferring to her property within her limits, obtain anything from Virginia in these particular cases.

The exception of Virginia to the finding of the Master disallowing

this total sum of $1,104,400.85, is based on her claim that purchases of stock in corporations doing business and owning property within the present limits of West Virginia, were state expenditures in the meaning of the ordinance and the decree. The position of West Virginia on this important question is that these were but investment of the funds of the state in private companies with the expectation at least of absolute security of the money invested and in many instances with the expectation of producing large dividends from the investment. These corporations were not the agents of the state for the investment of public funds, and were not controlled by the state as a sovereign. They were under the absolute control of the stockholders, subject to the general laws governing corporations. This was definitely settled in Virginia by the decision of its Supreme Court in 1856.

The case of *James River & Kanawha Co.* v. *Early*, 13 Gratt. 541, was an action to recover for the negligence of the corporation. In discussing the question of the liability of the company, the court said:

> "It is not a *public corporation* representing the *public* and *administering public* funds for the benefit of *the public*, but it is a joint stock company which has undertaken the construction of a work, useful to the public certainly, but *intended for the private emolument* of the stockholders in dividends of the profits" (p. 552).
>
> "That the State owned a large interest in the stock of the company will not vary the case * * * * a mere interest taken by the commonwealth in the stock would not be sufficient to bring an action against the company for neglect of its corporate duty within the influence of the decision in the case of *Sayre* v. *The Northwestern Turnpike Road*, 10 Leigh. 454 * * *" (p. 553).

As persuasive authority on the same line the case of *Moore* v. *Schoppert*, 22 W. Va. 282, is pertinent. This case was decided in 1883. It arose upon the attempt of the county court of Jefferson county, West Virginia, to take possession of a certain toll-house of

the Cross-Road and Summit Point Turnpike Company, a Virginia corporation. This corporation is Item 71 on page 375 of the record, and is included as such in the exception of Virginia to "Items 70 to 147, inclusive, turnpike companies aggregating $803,555.83." The county of Jefferson, apparently going on the theory that this road and other property of this company belonged to it as grantee from the State of Virginia under the act of February 3, 1863, (App. to R., p. 128) took possession of a toll-house and a lot of land on which it was situated, and this action of ejectment was instituted by this Virginia corporation, the Cross-Roads and Summit Point Turnpike Company, in the name of Moore, its president, to recover this piece of property. As elsewhere shown in this case, West Virginia granted to the counties in which the roads were situated all the stock received by it in the road corporations under the act of February 3, 1863. In this case the Supreme Court of West Virginia distinctly recognized and enforced the corporate ownership of the turnpike company of the property connected therewith. We quote the second syllabus, as follows:

> 2. "The effect of the legislation of the re-organized government of Virginia and of this state is to transfer to and vest in the different counties of this state the stock or interest of the State of Virginia and of this state in the roads of incorporated turnpike companies and to confer upon the respective county courts of this state the management and control of the stock or interest thus transferred, and also to give to said county courts control of any such roads or parts thereof lying in any county as such county may by agreement, condemnation, or otherwise acquire, or of such roads as may have been entirely abandoned by any such corporation or the private stockholders thereof; but it does not give to the county courts jurisdiction and control over any turnpike road belonging to any incorporated company, which is or shall be managing and controlling its road according to its charter, further than the right to control and represent as a stockholder the stock or interest acquired by the county from the state in such company, and to regulate the tolls of such company" (p. 289).

The Court in this case further says:

> "From the facts as they now appear in this case, it is evident that the county of Jefferson has no other interest in the house and lot in controversy in this action than that of a stockholder representing and controlling the stock formerly owned by the State of Virginia in the Cross-Roads and Summit Point Turnpike Company."

This case clearly shows the attitude of the courts of last resort of the State of West Virginia towards these corporations; and this decision, made twenty-seven years ago, has never been overruled or extinguished, but has always stood as the law of West Virginia in relation to these corporations. The fact remains as to each and all of these items mentioned in this exception, that Virginia subscribed and paid for and received shares of stock in each and every one of these corporations. These shares of stock in her possession were her own private property, subject to sale or any disposition the state chose to make thereof, and which under the laws of nations would not have passed to the State of West Virginia upon the separation, although the actual property of these corporations lay wholly or partly within the present limits of the State of West Virginia. The title of the State of West Virginia to these stocks is based alone on the act of February 3, 1863 (App. to R., p. 128). This act provided, as set out in the eighth paragraph of the bill, that West Virginia should duly account for these stocks in the settlement thereafter to be made with Virginia. This provision is practically a contemporaneous construction of the meaning of the ordinance on this subject. West Virginia certainly was not to pay for this property but once. Certainly it was not intended that she should pay the cost of the stock under the ordinance, and then pay for the value of the stock under the said act of February 3, 1863.

In the account filed by Virginia under Paragraph III. she included value of shares of stock in two banks, and insisted that the money invested by Virginia in such stock be allowed as state expenditure. The Master found against her on this contention, and, unless the general exception put at the end of their printed pamphlet of exceptions covers it, Virginia did not except to this finding of the Master.

Certain it is that she did not deem it of sufficient importance to specify those two cases in her exceptions, and we feel justified in the conclusion that she has abandoned her contention as to same. She is not very consistent in such abandonment, because there is no difference in law as to money being a "state expenditure," which is expended by the state in the purchase of stock in a corporation, whether that corporation be the Northwestern Bank of Wheeling, or the Wheeling, West Liberty and Bethany Turnpike Company. As will be set out later, Virginia purchased between 1832 and 1840, 4,500 shares of the stock of the Northwestern Bank of Wheeling, and in her original account attempted to charge West Virginia with $450,000 paid therefor as a state expenditure. In the year 1857 (R., p. 499), Virginia sold 1,082 shares of this stock for the sum of $113,671.42. If an expenditure once made, as claimed in the case of the Kanawha Turnpike and Kanawha River Improvements, could never be changed by the subsequent action of Virginia prior to the separation of the two states, then Virginia was not just to herself when she withdrew from said charge of $450,000 the value of these 1,082 shares of stock, which were sold, paid for, and delivered to the purchaser in 1857. We refer to this here to show an example that Virginia dealt with these stocks as a private person would. It is further shown in this record, especially under Paragraph VI. of the Master's report, that Virginia received large dividends from many of these investments.

Against sustaining this exception of Virginia is the undisputed fact that Virginia did not expend this money or any part thereof in West Virginia. The corporation in each particular case, through its board of directors and other officers, expended the money. There was no control in the state over this expenditure beyond such as might have been given by stock ownership. The legal entity which made the expenditure, was actually the corporation. The title of the property was in the corporation; and the corporation as such managed and controlled the property. In the case of the Northwestern Turnpike, the state, through its own officers, directed the expenditure of the money. The same was true in the case of the Staunton and Parkersburg Turnpike, and of the Covington and Ohio Railroad.

In these three notable instances no one but a state officer or agent had any authority whatever. But in those corporations named in this exception the corporation alone, through its duly elected officers, expended its own money for its own corporate purposes.

On page 12 of the exceptions filed by Virginia is the following:

"VI. COMPLAINANT'S SIXTH EXCEPTION."

> "In addition to the five exceptions above set forth, complainant respectfully asks that all of the alternative statements contained in the Master's report, made at the request of and pursuant to objections interposed before the Master by the complainant, and not covered by any of the foregoing exceptions, may be taken and treated as exceptions made by the complainant to said report because of and with respect to the errors of law appearing on the face of said report and of the record returned therewith, in the particulars to which said alternative statements respectively refer."

We have seen no brief of Virginia in this case, and we are at a loss to know whether counsel for Virginia intends this to mean that every alternative statement made by the Master at her request will be insisted upon at the hearing or not; but in the event that counsel shall do so, we desire to call attention to certain alternative findings made by the Master under Paragraph III., which we will take up in the order in which they are found in the report.

The first one of these is "Item 3, Winchester and Potomac Railroad, $170,532.00." This item is discussed at length by the Master (Report, pp. 47-64). The total item is $270,000, made up of the sum of $120,000 paid for stock of this corporation by Virginia, and the sum of $150,000 loaned by Virginia to this corporation upon security therefor being given. The property of this corporation consisted of a railroad running from Winchester, in the county of Frederick in Virginia, to Harper's Ferry on the Potomac River, in the county of Jefferson, now in West Virginia. This road was constructed under the acts of Virginia of 1831, and was one of the early railroads projected in the United States. 63.16 per cent of the mileage thereof is in West Virginia. The legislation dealing with this road prior to

the separation of the two states, consisted in incorporating the same, authorizing the subscription of stock, authorizing the loan, and then by the act of February 24, 1846, Virginia commuted the loan and the stock into an annuity of $5,000.00 a year forever (App., p. 30). This annuity was paid annually up to and including the year 1861 (R., p. 489). The ledger account on the books of the Internal Improvement Fund of Virginia which carried the subscription of $120,000 to the stock, was closed with the explanation that the stock had been surrendered for this annuity. All these facts are undisputed. With the beginning of the Civil War the Court will take judicial notice of the fact that no railroad running from Winchester to Harper's Ferry could pay annuities. This annuity accumulated during the years of the war from 1861 to 1865.

The first question that arises is the state's subscription to the capital stock of this corporation. This stands, we think, on the same basis as the subscription of the state to the stock of turnpike companies, banks, and other private corporations; and the same principles and argument apply here that we have applied to the other cases of such stock-subscription. They were not "state expenditures," nor were they "ordinary expenses of the state government"; they were merely and only *investments*. The special circumstances in this case of the annuity we will advert to presently.

As to the loan, we are fixed in our opinion. All the loans mentioned in the record, as was this one also, were secured in some way or manner. This record discloses three of them: the one under discussion; Item No. 15 (R., p. 373) Kanawha Board Bonds; and Item No. 150 (R., p. 377), Town of Bath. The first two have the principal and interest both secured by mortgage, and the third had the payment of the annual interest forever secured by a bond. Specific and careful provision was made in each case for this security. We deem the statement of this proposition sufficient to prove itself. In none of these cases was the money expended by Virginia. In each case it was expended by the borrower.

In this case of the Winchester and Potomac Railroad Company, Virginia, by acts passed on February 22, 1866, and April 25, 1867 (App., p. 31-2), provided that the corporation could pay to the

State of Virginia in bonds of that state at par the sum of $83,333.33, which was designated in the act as the "principal sum owing, together with all interest due thereon," and upon such payment the claim of the state against said company was to be "lifted and discharged." The Master finds (Rep., p. 64) that there was paid into the treasury of Virginia in 1866 in bonds under these acts, $118.518.12. A calculation will show that this was the principal sum of $83,333.33, plus the unpaid annuity from 1861 to time of payment, together with interest thereon. Under the act of 1846 this annuity of $5,000 was to be in lieu of interest on the debt due by this company to Virginia and of dividends on the stock of Virginia in the company, and so long as said $5,000 was paid the payment of the principal of the debt was to be postponed. Thus, we see that in 1867 Virginia capitalized the annuity of $5,000 at six per cent, making the principal sum of $83,333.33. She then exacted from the debtor the unpaid annuity with interest, and then she assigned to the company in consideration thereof all her right, title and interest and beneficial ownership in the loan and stock held by her in said company. In the event that the Court should find that West Virginia would be chargeable with this sum otherwise, then we confidently refer to this action of Virginia as an absolute release of all such claim.

Again: The act of February 3, 1863, (App. p. 128,) provides that there shall be transferred to West Virginia the "stocks of any company or corporation, the principal office or place of business whereof is located within the said boundaries" of West Virginia. The principal office of this railroad company was at Winchester, now and then in Virginia. Hence, none of the stock was transferable to West Virginia. Virginia evidently so understoood it, for after the Civil War she legislated about this road, made contracts with it, and otherwise dealt with it, without regard to West Virginia, and quite in contrast with her acts after the war in connection with the Covington & Ohio Railroad. By reference to pages 35 to 49 of the Appendix to the Record, it will be seen that the acts of Virginia respecting this last named railroad were concurrent with acts of West Virginia.

Item 15, Kanawha Board Bonds—$60,000.

This item is referred to above as one of the loans set up in the record, made by Virginia to the James River and Kanawha Company, and secured by mortgage. The bonds were delivered to a private corporation, which had the power to do as it pleased with such bonds and the money derived from the sale thereof. The Master found that West Virginia was not chargeable therewith (Rep., p. 71).

Item 53, Harper's Ferry Raid—$189,715.59.

The Court will take judicial notice of the John Brown Raid and what it meant. It was an invasion of the State of Virginia by an outside armed force. The fact that Brown accidentally entered territory that afterwards became a part of the State of West Virginia, and that this large sum of money was expended in the transportation of troops, pay of soldiers, quartermasters' supplies and subsistence of the soldiers called from all over Virginia and most of them from the territory still Virginia, does not under the meaning of this paragraph and the ordinance make this a state expenditure within the limits of West Virginia. It was a most extraordinary event—an invasion of the sovereignty of a state, and an armed conflict with the officers of the state. After the prosecutions of the invaders were ended, and punishment inflicted by the execution of the judgment of the court, the local evidence of the fact that this large sum had been spent partly in Jefferson county, now in West Virginia, disappeared as quickly as fog before the morning sun. The soldiers returned to their homes in Virginia. This subject is referred to again herein under Paragraph IV.

Item 54, School Commissioners—$830,865.37.

The Master (Rep., p. 74) gives a very succinct statement of this item and the reasons why he disallowed the same. It was the total of the annual appropriations for the education of poor children, which were assigned to the counties now forming the State of West Virginia. It was no more of a "state expenditure" in West Virginia than the payment of the salaries of the judges of the courts was such an

expenditure in that state. Hereafter, when this subject is again reached under Paragraph IV., we will state some reasons why we think that the most of it should be eliminated from this cause. Certain it is that there is no error in the refusal of the Master to allow it as an expenditure under Paragraph III.

Item 56, Trans-Alleghany Lunatic Asylum—$27,000.

Virginia never erected any public building in that part of her territory now in West Virginia. The only building she commenced in what is now West Virginia was an asylum at Weston in Lewis county, and called in the account by the above name. Prior to January 1, 1861, the sum of $125,000 was appropriated for purchase of the site and the construction of this building. On January 1, 1861, there remained of this appropriation the sum of $27,000 in bank to the credit of the board of directors of this asylum and in the hands of the treasurer of such board (R., pp. 484-5). The restored government of Virginia in January, 1861, took over this sum of $27,000 and placed the same in two banks in the City of Wheeling to the credit of the State of Virginia, and used the same for the purpose of the restored government. It needed money at that time to defend the loyal portion of the state. This money was not expended before January, 1861. It was the property of the state, and the state had the right to take it and use it for other purposes. Some time later, the state appropriated large sums of money for the purpose of completing this asylum, but that does not affect the fact that this $27,000 had not been expended at all on January 1, 1861; in fact this sum was never used for that purpose.

Item 148, Fairmont Bank $50,000; and Item 149, Northwestern Bank of Virginia at Wheeling, $341,800.

These two items were on account of the investment by Virginia of that much money in the purchase of shares of stock in these two banks. As stated heretofore, the original purchase by Virginia in the Northwestern Bank was somewhat larger, and Virginia in 1857 sold 1,082 shares, making a certain profit thereon. She covered this money into her treasury, and on the hearing before the Master she

withdrew the original claim of $450,000 and reduced it to this amount, by reason of such sale.

The attitude of Virginia in this cause has been that where an expenditure had once been made, as claimed by her, no act of hers thereafter in connection therewith would affect or alter the fact. In other words, that such expenditure, when once made, should be charged in this account against West Virginia, regardless of the fact that Virginia may have sold the subject matter thereof prior to the first day of January, 1861, to some private person or corporation. These bank investments were extremely profitable. It will be seen by reference to page 176 of the Master's report under Paragraph VI. of the decree, that he reports the dividends from these identical stockholdings during the period of the accounting as $786,666.98. If Virginia intends to abandon the claim asserted by her for the amount of these bank stocks, and to attempt to distinguish the money invested in them from moneys invested in navigation or bridge company stocks, it must be because the money invested was paid back in double quantity in dividends. If West Virginia is to be charged with the moneys invested, Virginia certainly would be charged with the moneys received on the investment. We, of course, adhere to our original position, that money invested by Virginia in the stocks of all these private corporations was not a state expenditure in the meaning of the decree and the ordinance, but, as shown by the Master in his report by his excerpts from the constitution and laws of Virginia, was intended by the State of Virginia as the investment of funds in private corporations for profit. This view is made well-nigh conclusive by the fact that Virginia, by statute, prohibited the sale or transfer of any of these stocks when productive or could likely be made productive.

PARAGRAPH IV. OF DECREE.

"4. *Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia,*

with and without slaves, as shown by the census of the United States."

This paragraph, like Paragraph III., is based on the Wheeling ordinance. The ordinance used the language "a just proportion of the ordinary expenses of the state government since any part of said debt was contracted." The decree uses the language "government of Virginia," instead of the words "state government." The parties to this controversy have apparently proceeded on the proposition that the language of the decree was intended to mean the same as that of the ordinance. The agreed period for the beginning of this account is the 19th day of March, 1823. There are no disputes as to the amounts under this paragraph. The only questions are whether certain items come under the head of "the ordinary expenses of the state government."

First, we take up the exceptions filed by West Virginia to the findings of the Master under this paragraph to which she objects. As before stated, in this part of the brief the aim is to state the facts only, and discussions of questions of law are merely incidental, and indulged in in connection with the facts only so far as necessary to make clear the position of West Virginia, and justify her exceptions.

Item No. 1, Tobacco Receipts $353,123.96; Master's Report, p. 114.

An explanation is needed to show what this means. Virginia, in her original exhibit (printed as Appendix A hereto and an exhibit herewith) under this paragraph, entered into many details. She divided the ordinary expenses, as based on her theory, into five divisions, to wit: (1) general expenses of the government; (2) administrative expenses of the Board of Public Works; (3) maps, expenses of surveys, and inspection of internal improvements; (4) general expenses of the Literary Fund; and (5) interest charges.

Under general expenses of the government there were included the following subjects, to wit: General Assembly, officers of the government, criminal charges, court charges, lunatic asylums, penitentiary, militia, public warehouses, tobacco sales, slaves transported and exe-

cuted, and many other smaller items. She gave credit on the total of these items for funds derived from the sale of articles made in the penitentiary, and for fees and other moneys earned by her officers and persons whose salaries and wages were paid by the state and which were charged to this account of ordinary expenses of the state government. One of the subjects of state supervision in Virginia was the inspection of tobacco. The Court will take judicial notice of the fact that for two centuries at least tobacco had been an extremely important product of Virginia. The state appointed certain officers, called inspectors of tobacco, and paid them certain sums as salaries, and they collected from the owners of this tobacco certain fees for inspecting their tobacco. These fees were covered into the state treasury as a part of the state's moneys, and the Master finds (Report, p. 116) that the sum set out above was actually paid into the commonwealth's treasury from this source. West Virginia believes that she is entitled to a credit of this sum from the total amount of the ordinary expenses of the state government, and believes it to be very inconsistent with the original admissions of Virginia under this identical head to refuse to allow to West Virginia this credit. Virginia herself says that it is correct to allow a credit of $275,000 for moneys received from the sales of goods manufactured in the state penitentiary. The expenses of the penitentiary are charged to ordinary expenses, and the credit is given by Virginia. Under the laws of Virginia at that time, certain slaves were transported to foreign countries and sold. The owners of such slaves were paid an appraised price from the state treasury. The moneys derived from the sale of these slaves, $272,000, were credited on the total of the ordinary expenses. She had certain state officers called weigh-masters of live stock. They collected certain fees from the persons for whom they did services, and these fees were paid into the state treasury, and Virginia voluntarily gave credit therefor in her statements filed with the Master under this paragraph. We are therefore surprised at her contention that the amounts collected by the inspectors of tobacco and turned into the treasury should not likewise be a credit. When the account of ordinary expenses is charged with all the salaries of all state officers and employees and all expenses of carrying out the state laws, it

seems that as a matter of principle it would necessarily follow that credit must be given for all sums of money earned by, through or under the administration of the affairs of the state by such officers and employees, and we utterly fail to see any difference between the amounts earned by inspectors of tobacco and the amounts earned by weigh-masters of live stock and the other items as above set out and conceded by Virginia in her original exhibit No. 4 under this paragraph, printed as an appendix hereto. We must therefore insist upon this claim of West Virginia, and respectfully ask that this exception be sustained, and that said sum of $343,123.96 be deducted from the total of ordinary expenses of the state government.

Exceptions to Item No. 5, maps (board of public works), $11,446.48, will be discussed along with exceptions to Item No. 27, general expenses connected with surveys, $106,983.67.

Items No. 7, International Exchanges, $2,836.19; No. 9, Printing Treasury Notes, $375.74; No. 18, Attorney General fees for prosecuting Seldon, Withers & Co., $500; and No. 19, part of $5,000 expended under the act of February 14, 1844, are in our opinion not properly charged as a part of the ordinary expenses of the state government, but a discussion of each would take too much time and space. This is especially true when we have under this identical head an item of $18,574,747.84, to the allowance of which as an ordinary expense we earnestly object. We therefore waive the exceptions of Items 7, 9, 18, and part of 19 as set out above.

Item 5, Maps (Board of Public Works) ----$ 11,446.48
Item 23, Sundry Board of Public Works expenses ----------$ 36,728.50
Item 27, General Expenses connected with Surveys ----------$106,983.67

These three items are found on pages 118, 128 and 134 of the Master's report. The general subject has already been discussed herein, and is also discussed on page 75 of the Master's report at Item 55, Paragraph III. We are of the opinion, as heretofore stated, that the amount allowed by the Master on the last named page of his

report, $60,873.19, was improperly allowed as a state expenditure, and that the whole of the three above items, 5, 23 and 27, together with the additional amount, should be allowed as an ordinary expense of the state government, and no part thereof as a state expenditure. This would make the total of Item 27, $250,206.56. There are sundry parts of these Board of Public Works expenses which to our mind seem clearly improper to be classed as ordinary expenses, yet considering the comparative smallness of the amounts we will not further insist, for the same reasons that are given above as to other small amounts.

Item 25, Harper's Ferry Raid.....$251,763.65
Item 16, Calling out Militia at Wheeling in 1836 .....$ 1,099.00

The Master has allowed both of these items as a part of the ordinary expenses of the state government (Rep., p 129). Virginia set up this amount, less a few deductions, as a state expenditure within the limits of West Virginia, and the Attorney General of Virginia stated her position to be that any moneys, which could be shown to have been spent in West Virginia, no matter for what purpose, were to be classed herein as state expenditures. In some instances, she has classed exactly similar expenditures when expended in West Virginia as state expenditures under Paragraph III., but when expended in Virginia she has classed them as ordinary expenses under Paragraph IV. It seems to us that under no possibility of the use of language, can it be said that exigencies of the kind for which these moneys were spent could be called "ordinary." The invasion of a state by an outside armed force for the purpose of freeing the slaves, and thus taking away from the people of the state more than $300,000,000 worth of property, was certainly somewhat "extraordinary". It would even come under the definition of one of the accountants of the plaintiff, who, when he testified in this case, said that every expense which was not "ordinary" was "extraordinary". It is true, as stated by the Master, that the maintenance of a military force was admitted as an ordinary expense by the defendant. But the defendant found on an examination of this item, that the state had maintained

such military force ever since its formation, and such maintenance and the laws therefor were general, and in existence on the 19th day of March, 1823, when this account began, and were in existence until the end of this account, as they had been from the year 1788 at least. After the happening of the two events, they were brought to the attention of the legislature of Virginia, and the appropriations were made, we believe, in each case at least two years afterwards. They were most *unusual and extraordinary*. No fixed provision of any kind had ever been made in anticipation of them. The fact is that only two such events happened between March 19, 1823, and January 1, 1861. This statement applies to the whole State of Virginia. It should be noted that, in the preparation for the presentation of evidence in this cause, every expenditure made by Virginia during the entire period of the accounting, has been carefully scrutinized, and counsel for the plaintiff have set up everything that could by any possibility be charged to this defendant. Thus, we see that the great State of Virginia, extending from the Atlantic ocean to the Ohio river, comprising an area of 66,000 square miles, only had within its immense borders, two calls for the militia in thirty-eight years. To provide funds to meet the expenses of these two extraordinary events, special acts of the legislature, long after the happening of the events, were passed; and the legislature itself fixed the status of the Harper's Ferry case by saying that the moneys therefor were appropriated for the "defense of the commonwealth". One could as well call the expenses of Virginia in defending her soil against the British soldiers in the war of 1812-14 an ordinary expense of the state government. It is true that the expenditure at Wheeling of the $1,099 might be called a part of the criminal expenses; that is, a part of the expenses for enforcing the penal laws of the state, and be allowed on that score; but the same reason does not apply to the Harper's Ferry raid. This historical event stands out as one of the spectacular and extraordinary occasions in the history of the United States; and now, more than fifty years after its happening, the chief actor therein, John Brown, is still looked upon as a martyr in more than half of these United States, and his memory honored as such by the erection of monuments and public celebrations and the like.

Historically, it is simply impossible to say that this was an ordinary event, an ordinary occasion, or that the cost thereof was an ordinary expense. Its status in history is fixed otherwise.

Item 24, Interest on Public Debt, Aggregate $18,547,747.84.

This is the largest item in this account under this paragraph. We do not understand that there are any disputes of fact in relation thereto, but there are certain facts in the record which we think are proper here to be summarized, and which will have a bearing on the discussion of law relating to this item and found in Part III. of this brief. It is not the purpose of this part of the brief to make extended discussions of any questions of law, as heretofore stated.

In plaintiff's original Exhibit D-1 (which was their statement of ordinary expenses of the state government under Paragraph IV., and printed as Appendix A hereof), there is set out a partially detailed account of this interest. Certain credits were there given, amounting to $2,418,116, which were deducted from the total interest paid by the state during the period of accounting in this cause, and that deduction leaves the balance as at the head of this section of the brief, to wit: $18,547,747.84. It is our purpose to take up those deductions and other sums which appear on pages 1056, 1058 and 1059 of the printed record.

As a preliminary to this discussion, we state an undisputed fact, that the entire amount received from the sale of bonds of the State of Virginia was used for the purpose of either constructing some sort of a public work by the state directly, or for the purchase of stock or bonds of some corporation, of which turnpike, bank, railroad, navigation, or bridge companies were the most usual. There was expended during the said period by Virginia in its subscriptions to the capital stock of banks within her *present* territory the sum of $2,108,591. There was expended in the purchase of stock of turnpike and road companies wholly within the *same* territory the sum of $1,897,747. There was expended in the purchase of stock of bridge companies in the *same* territory the sum of $49,622. There was expended on account of purchase of stock of navigation companies

in the *same* territory the sum of $908,173. There was expended for the purchase of stock of railroad companies wholly within the *same* territory the sum of $13,713,256. There was expended as loans to railroad companies within the *same* territory the sum of $2,930,000. There was expended in the direct construction of the Blue Ridge Railroad within the *same* territory $1,604,824. There was expended in the construction of the Covington and Ohio Railroad *in the State of Virginia* the sum of $1,640,668. There was expended for the construction of turnpike and roads wholly on state account, and not for the purchase of any stock in the companies, within the *same* territory, $791,888. There was expended directly on state account in the *same* territory in the construction of turnpikes and roads extending into and between the territory now constituting the two states, the sum of $247,289. This last sum is Virginia's proportion on a mileage basis of the actual cost of the construction of such roads. There was expended in the purchase of stock of the Alexandria Canal Company the sum of $272,000. There was expended in the purchase of stock of the Winchester and Potomac Railroad Company and in a loan to said company, the sum of $270,000. On a mileage basis, 41⅔ per cent of this road is in Virginia and 58⅓ per cent in West Virginia. There was expended for the purchase of stock in the Chesapeake and Ohio Canal Company (a Maryland corporation) the sum of $250,000. There was expended for construction work and improvements on the James River Canal, Blue Ridge Canal, and Kanawha Road and River $1,216,666. Stock was taken for this upon the transfer of the canals and Kanawha Road and Kanawha River improvements to the James River and Kanawha Company. There was expended in the purchase of stock of the James River and Kanawha Company directly the sum of $2,000,000 additional. There were cash loans made by Virginia to this company of $890,000. Virginia loaned to this company bonds of the par value of $1,597,000. She guaranteed for this company bonds of the par value of $2,260,000. By the act of March 23, 1860, she assumed all of these bonds as her original debt and took in lieu thereof stock of the James River and Kanawha Company. The expenditures above named, together with others paid in interest on the bonds, amounted to a total of $9,547,582.

(R., pp. 820 L. & M.). These expenditures aggregated a sum in excess of $36,000,000, all of which was expended in the present State of Virginia except $302,000 on the Kanawha Road and Kanawha River. Practically all of this immense sum was paid for in bonds, which either formed a part of the public debt on the first day of January, 1861, or which had been retired through the operations of the Sinking Fund, or by the payment thereof by the state.

It will be seen that each and every one of these expenditures was of an extraordinary character for a state to make. They could not have been then called and would not be now called "ordinary expenditures of the state government."

While these immense expenditures were being made in the territory of the present State of Virginia, there was only expended in the counties now forming West Virginia, according to the claim of the Commonwealth of Virginia in this case, out of the moneys derived from the sale of bonds for the construction of roads, etc., and for the purchase of stocks, the sum of $4,200,000. (West Virginia does not concede that this sum was expended in the meaning of the ordinance and the decree, and the Master finds that only $2,811,000 was so expended in West Virginia, to which amount West Virginia excepts, because too large.) It will thus be seen that according to the claim of Virginia, out of a total of $40,000,000 spent for the purposes above set out, nine-tenths thereof was spent in the present State of Virginia, and one-tenth in the present State of West Virginia.

Naturally these immense investments in stocks and loans were not without some returns to the state, and Virginia recognizing this fact, made certain deductions in her "interest schedule" annexed to her original exhibit D-1 under the fourth paragraph. Credit is there given for certain sums paid as interest, as follows:

Interest on bonds in the Literary Fund	$1,324,051.00
Interest on state stock	$312,214.00
Interest on state stock	639,670.00
Interest on James River and Kanawha Company bonds	142,181.00
Total	$2,418,116.00

But in addition to the amounts collected by the state and included in the said total sum of $2,418,116, there are many other large items of income from these investments of the moneys made by the commonwealth which should be deducted if West Virginia is to be charged with any part of this interest as an ordinary expense of the state government.

There was received by Virginia the following sums from the following classes of corporations on account of investments made by Virginia therein of the moneys arising from sale of bonds, to wit:

Dividends on Bank stock	$5,936,000.00
Dividends and interest from Railroad Companies	1,748,000.00
Dividends and interest from Canal Companies	321,000.00
Dividends and interest from Turnpike Companies	119,000.00
Dividends and interest from James River and Kanawha Co.	926,000.00
Tolls from James River Company	588,000.00
Interest and annuity, Winchester & Potomac Railroad Co.	76,000.00
Tolls and Interest:	
Northwestern Turnpike, Southwestern Turnpike, Staunton & Parkersburg Turnpike	$ 77,000.00
Total	$ 9,791,000.00

In this sum of $9,791,000 there is included the sum of $1,094,000 for which credit has been given. The true total is therefore $8,697,000.

There was received by the commonwealth from investments in the territory now forming West Virginia, for which no credit has been given to West Virginia in this account anywhere, the following sums:

Dividends from Banks	$786,666.00
Dividends from Turnpike Companies	15,000.00
Dividends from Bridge Companies	6,000.00
Total	$807,666.00

Of these large sums it is probable that part of the bank dividends arose from stock which was not purchased with money derived from sale of the state's bonds; but it is certain that all of the balance was wholly derived from investments made by the commonwealth with moneys derived from the sale of such bonds, and it is further a certainty that nearly all of the bank dividends from the West Virginia counties and a goodly portion of the bank dividends from the Virginia counties were derived from the stocks which were paid for by the issue of bonds of the commonwealth. It is certain that in Virginia, from companies whose stock was purchased with the proceeds of bonds, and from works which were constructed by the commonwealth with the proceeds of bonds, there was derived as dividends and interest and paid into the treasury, the sum of $3,855,000; but credit was given by the commonwealth in this account for only $1,094,000 thereof, leaving a balance of $2,761,000 so derived, for which no credit is given in this account. There should be added to this last named sum at least $1,500,000 for the dividends received from banks, the stock of which was purchased by the commonwealth out of the proceeds of her bonds. This last named sum is probably too small, but the record does not show the exact amount.

This extraordinary condition of affairs seems to us to constitute very strong reason indeed why this interest on the public debt should not be charged as an ordinary expense of the state government. Investments for profit made by the commonwealth cannot be considered as performing one of the usual, customary or ordinary duties of a state government. This is proven by the investigations made by the commonwealth through Chief Justice Marshall, and many other able men of Virginia before her system of internal improvements was commenced. The matter was in fact considered for a great many years, and many discussions for and against the inauguration thereof were had. Many reports were written by able commissions and many messages on the subject were penned by able executives. It was recognized then as a work of *extraordinary* character and one outside of the usual, *ordinary* functions of a state government.

West Virginia is charged by the Master under Paragraph III. as her portion of the ordinary expenses of the state government, the

sum of $2,811,000. Of this amount about $100,000 was expended prior to the year 1831. A further sum of about $500,000 was expended between 1830 and 1840. Another sum of about $500,000 was expended between 1840 and 1850. The balance between 1850 and 1861, and the greater part of this balance of $1,900,000 was expended between 1855 and 1861. These facts were known to the Master when he made up his report, yet he finds that $18,500,000 of interest on the public debt is an ordinary expense of the state government *under the peculiar circumstances of this case.* The result of this finding is that West Virginia would pay from one-fourth to one-tenth, as this Court may determine, of this huge sum of money. For argument's sake we will suppose that this court will determine that a just proportion of these ordinary expenses to be paid by West Virginia under the ordinance would be one-fourth. That would make West Virginia liable for more than $4,600,000 of this interest on the public debt. This sum would be treble the amount of interest that Virginia actually paid on the amount found by the Master to have been expended by the commonwealth within the present limits of West Virginia.

It must be remembered that under Paragraph VI. of the decree, it is shown that West Virginia paid into the treasury of the commonwealth more than $6,100,000 in taxes during the period. While West Virginia receives credit in the settlement under the ordinance for this amount, she does not receive any interest thereon or on any part thereof. Certainly, it would have been just and equitable for the Master to have offset the interest on the state expenditure of $2,800,000 by the use of the $6,100,000.

It must be further remembered that the men who passed or adopted the ordinance knew of this expenditure for interest on the public debt; knew what items entered into the expenses of the state government; knew what expenditures had been made by the state within the limits of the counties now forming West Virginia. It is shown by the historical records of Virginia that many of them had been members of the legislature of Virginia; that many of them had been members of the constitutional convention of 1851, wherein these matters were very thoroughly discussed; that one citizen of the territory now West Virginia had been at that time (1861) for many years auditor of the

commonwealth; that this auditor had made annual reports, some of which have been filed as exhibits in this cause. These reports were large volumes, and gave the annual details of the moneys received and expended by the commonwealth. It gave the details of the bonds issued and sold, and the purposes for which their proceeds were used. In addition, there were the annual reports of the Board of Public Works, which contained all the reports made to them by the state engineer and all the other officers and employees of the state under their authority. A glance at these reports will show how full and complete they were as to the cost of all of these public works.

A controversy had existed for at least forty years concerning the expenditure of the public moneys derived from bonds on these public works. Citizens of the territory now within West Virginia had for that period claimed that a gross injustice was done to the people west of the mountains, and justified their contention by giving details thereof; and even to this day, with the lapse of fifty years for the passion and prejudice and the deep-seated feeling of injustice suffered at that period to pass away, we submit that no unbiased person will say that West Virginia received her share of these public improvements, when it is considered that out of $40,000,000 expended therefor Virginia only *claimed* to have expended one-tenth in the present limits of West Virginia. Virginia spent during this period $20,000,000 and more in purchasing stock and making loans for, and directly building, railroads in her present territory. Between 1855 and 1860 she expended $1,146,000 in the direct construction of one railroad in West Virginia, and that was done, as is plainly to be seen, for the benefit of the Virginia Central Railroad, which was built from her capital at Richmond to a point within fifteen miles of the present limits of West Virginia, and which, as it was then seen, could not be made a successful financial venture unless it reached the Ohio river and tapped the paying traffic of that region and that of counties now in West Virginia. This road and its connections would carry this rich traffic, by way of Virginia's capital, to her eastern seaboard, and prove, as it was believed, of immense benefit to that part of the old state.

The division of the old state was not the growth of a few weeks of civil war, but it was the result of what the people of the counties now

forming West Virginia believed and said was the gross injustice done to the counties west of the mountains by the larger population east thereof. The counties of West Virginia found an opportunity in 1861 to do that for which many had hoped for half a century preceding that date.

The record in this cause shows that in 1860 the slave population of Virginia amounted to 490,000 people. Of these only 18,000 were inhabitants of the counties now forming West Virginia. Two-thirds of this number of 18,000 were inhabitants of a half dozen border counties. Slaves were then the most staple and productive property. At $350 apiece this property was worth over $170,000,000, of which about $6,000,000 belonged to the people of the counties now forming West Virginia, and $164,000,000 to the people of the counties now forming the State of Virginia. The estimate of $350 per slave is a very low one indeed. If we were to take the estimate placed upon this class of property by the owners thereof, as shown by the census of the United States for 1860, the value would be more than double our figures. The auditor of Virginia estimated the slaves to be worth $612.63 each. (Auditor's report for 1858-59, p. 392.)

By the constitution of 1851, which the majority east of the mountains imposed upon the state, it was decreed that none of these slaves under twelve years old, although property and subject to sale, should be taxed, and those above the age of twelve years were taxed at a very small rate which amounted to $1.20 a person. The assessor's books show, as set out in the record, that the assessment of these slaves in number was much less than that shown by the census of the United States. Certain it is that the slaves above twelve years of age would easily average the price of five to seven hundred dollars apiece, but for the selfish reasons of the owners they practically escaped taxation. All the property of the people west of the mountains, except their small and decreasing number of slaves, paid its full share of taxes and had no such exemptions.

By reason of this unjust system of taxation the people living in the territory now West Virginia, from March 19, 1823 to January 1, 1861, the period of accounting in this cause, paid very many thousands of dollars in taxes above their just share. The system worked

a double injustice; for the people west of the mountains not only paid their just share of taxes, but they were compelled to pay in addition what the people east of the mountains ought to have paid and did not pay. This unjust system of taxation was put and kept upon the western counties by an equally unjust scheme of representation in the General Assembly of Virginia, whereby the basis of representation in that body was arbitrarily fixed to favor the eastern part of the state. It provided among other things, that the owner of slaves should have three votes for every five slaves owned by him. By the political power thus given them by their slaves the owners thereof in eastern Virginia practically exempted their slaves from taxation; and also by this unjust power they enacted laws to protect them in the ownership of this property, which entailed great expense upon the state; such items, for instance, as "slaves transported and executed," $311,000; "transportation of free persons of color to Liberia," $26,103.50; "fugitive slave fund." $5201; as well as no inconsiderable part of the large disbursements for military and militia expenses, criminal expenses and penitentiary expenses. By reference to Appendix A hereof, it will be seen, that from 1820 to 1861 the disbursements out of the treasury of Virginia for "criminal expenses," were $1,785,632.11, exclusive of $1,188,212.34 of "court charges;" and that the disbursements, during that period, on account of military expenses, embraced in such item. as the "militia," "public arsenals," "public guard." "guards in the country," "military contingent," "armory—manufactory and repairs of arms," etc., etc., aggregated $1,325,000. This does not include disbursements on account of the penitentiary, of $844,000, nor the cost of the Harper's Ferry raid, $255,745.77 (Rec., p. 374). It should be remembered that there was not in the entire territory of Virginia, which is now West Virginia, on the 1st day of January, 1861, a single mile of state-built or state-aided railroad, nor a mile of canal, nor a state building; not even a school, not a public institution of any kind. The asylum for the insane, at Weston had just been commenced. The capitol and all the buildings appertaining thereto, the university, the asylums, the institutes, armories, arsenals, and all other public institutions, as well as all the railroads and canals constructed wholly or partly by state money, and in which

millions of such money had been expended, were all located in eastern Virginia and fell to that part of Virginia upon the formation of West Virginia.

With this knowledge and under these conditions the ordinance was framed and passed. It was believed to be just that West Virginia should pay for the state expenditures within her limits during the period of the contraction of this debt; and also should pay a just proportion of the ordinary expenses of the state government during the same period. These two sections taken together necessarily imply a distinction between these two classes of expenditures. They were made with complete knowledge at first hand of the history of the state for the period. Is it right, reasonable, or just to hold that this ordinance was intended to mean that West Virginia was to pay the full amount of all these expenditures, and in addition thereto to pay a large amount of the interest on the public debt which had been expended in the limits of Virginia, the objects upon which it had been expended being still the property of Virginia and situated within her territory? Is it not more reasonable and just to believe that they intended that the state expenditures should be paid, and that the just proportion of ordinary expenses of the state government meant those expenses which were then, had been in 1823, and are now the usual and customary expenses attached to the running of any state government, to wit, the legislative, executive, and judicial expenses, together with those of the state educational system and the state eleemosynary institutions? No stretch of the imagination can include investment in private corporations as a part of the usual and customary functions of a state.

Again, as stated above, the interest on the moneys with which West Virginia is charged is largely in excess of the interest on the moneys expended in West Virginia.

The act of February 3, 1863, which transferred certain property of Virginia within the limits of West Virginia to the new state, is so near to the time of the passage of the ordinance and the adoption of the constitution of 1862, that it becomes entitled to weight as a contemporaneous construction of these documents. It is inconceivable

that in a little over a year after the adoption of the ordinance they would have passed the act just spoken of if they believed they were to pay the value of the properties received by the act and in addition interest on the money which created the properties?

We can think of no more apt illustration of the falsity of the finding of this interest as an ordinary expense of the state government, than that of the ordinary family. Every one can apply this to himself, whether he be a lawyer or a layman. Every family has certain usual expenses, which can be as justly termed "ordinary expenses of family government and maintenance," as those in this case are termed "ordinary expenses of the state government and maintenance." We use the word "maintenance" advisedly, because the language of the ordinance undoubtedly means those ordinary expenses which are necessary to maintain a state government. The ordinary expenses of a family would surely include food, clothing, a house in which to live, gotten by rent or otherwise, furniture, expenses of education, expenses of illness, and the expenses necessary and incident to the care of a house and things of like nature for the necessities and comfort of the household. With these expenses upon him, if the head of the family should determine upon an investment in the purchase of a corner lot and the erection of a building thereon, for rental, or should invest in stocks for the purpose of receiving dividends, and the funds not being in hand, he would have to borrow the same and pay interest thereon, is it possible to say that the interest on this loan, made for this purpose, wholly unconnected with the usual expenses and purposes of family government and maintenance, is an ordinary family expense?

That was the condition of Virginia in 1822. She owed no public debt. She had no interest to pay. She entered upon this system of borrowing money for purposes wholly unconnected with her usual and customary duties as a state government. Surely this expenditure was extraordinary; the purpose was extraordinary; this payment of interest then was extraordinary and unusual. Can this principle be changed by the fact that Virginia enlarged these expenditures, enlarged her issue of bonds, and necessarily continued and enlarged her payment of interest?

Item 26, Expended for Primary Schools, $2,400,331.11.

The differentiation of the sum of $2,400,331.11 from other funds expended for primary schools, which were derived directly from taxation, is partly based on the source from which it is derived. Virginia had what was known as the Literary Fund. This fund was mostly in hand when our period commenced on March 19, 1823. Some accretions were made to it from time to time from forfeitures, fines and escheats. None of the principal of this fund was expended. This sum of $2,400,331.11 came from the income derived from the investment of the principal of this Literary Fund in bonds, stocks and loans, from which was derived dividends and interest, and these dividends and interest were expended by the state for educational purposes. As stated above, most of the principal of this fund was in hand when our period commenced, and Virginia remained the owner of all of it when our period ended on January 1, 1861. This fund was during that period the property of the entire state. It had come from the property of the entire state, as shown by the record, and it is an historical fact, that the nucleus of the fund was the money collected from the government of the United States by the Commonwealth of Virginia on account of Revolutionary War claims.

A brief analysis of this fund and statement of the methods of its production are pertinent at this point. This analysis is made from the figures found in the record, pages 538-B to 538-H. These figures are agreed to by the accountants of each party. They show that on the 19th of March, 1823, there was in the Literary Fund, in cash and moneys invested, $1,240,000; that on the first day of January, 1861, there was $2,200,000; there was received during the period from all sources $4,869,000; and that there was paid out in cash and charged off on account of losses $3,907,000.

The accretions to the fund, making up the sum of $4,869,000, are divided as follows:

From counties now forming West Virginia under laws then in existence....	$114,395.00
From counties now forming Virginia....	401,972.00

These sums under the law were permanent additions to the fund

and became part of the principal, which was in no way to be expended. These permanent additions were invested from time to time, as they came in, like other parts of the principal, and only the income thereof was permitted to be expended.

There was received from the United States war claims $182,441. This was a permanent addition, and comes under the rule set out above as to the funds.

There was received as dividends on stock and as interest on loans made to persons or corporations other than the commonwealth, the sum of $1,059,695. Of this sum $800,764 were dividends on bank stock owned by this fund, and $155,291 were dividends on James River Company stock owned by this fund.

There was received directly from the treasury of the commonwealth,

1.	United States war claims ---------- This sum was a permanent addition to the fund and was not to be annually expended like its income.	$ 77,216.00
2.	Capitation taxes ---------- This sum was expended annually through the Literary Fund, as received.	751,481.00
3.	Interest on investments in state bonds--	2,230,445.00
4.	Dividends on James River Co. stock----	50,686.00
	Total ----------	$4,869,000.00

The expenditures made from this fund, which are charged to the account of "ordinary expenses of the state government" under the ordinance and the decree in this cause, are as follows:

For account of Primary Schools—		
Paid from income from investments ----------	$2,400,331.00	
Paid from capitation tax	655,908.00	$3,056,239.00
University of Virginia ----------		613,000.00
Institution of Deaf, Dumb & Blind ----		40,821.00
Virginia Military Institute ----------		28,500.00
Salaries and expenses of Board ------		85,322.00
Total ----------		$3,823,882.00

Each and every one of these items of expenditure, as stated above, are charged to the account of "ordinary expenses of the state government". We have admitted that the sum of $655,908, paid out of capitation taxes, should be charged against us, for the reason that this sum was taken from the taxes collected from the whole state, and West Virginia has received under Paragraph VI. credit for the amount of taxes paid in by her counties to this fund. We have not seriously objected to the amounts paid to the University and to the other institutions named above. We have not objected that the salaries and expenses of the board were charged as part of the ordinary expenses of the state government. We have insisted, and still insist, that the sum of $2,400,000 is *not* a proper charge, because of the reasons set out above and for the further reasons hereinafter given.

The analysis of the figures above given plainly shows that no moneys were expended out of the capital of the Literary Fund as it existed on March 19, 1863. There was added to the capital of this fund during the period $960,000, of which $260,000 came from the United States on war claims, *and this was the property of the whole state.* The additional sum of $516,000 thereof came from redemption of lands, escheats, and things of like nature. Of this sum about two-sevenths came from counties now in the state of West Virginia. The balance of this capital account came from income of the fund which was not expended, and went back into the fund as a permanent addition thereto.

Virginia has seen fit to give credit against the item of interest on the public debt under Paragraph IV., the sum of $1,324,000, being a part of the interest received from the commonwealth on state bonds. Why she did not also give credit for the $926,919 interest received by this fund from the same source, and the $50,686 received from the commonwealth as interest on James River Company stock, we are at a loss to understand. West Virginia is charged twice in this account with these two sums, once as interest on the public debt, and once as expenditures from the Literary Fund. Common justice requires that, if the Court shall be of opinion that it is proper to charge this sum of $2,400,000 to the account of ordinary expenses under the particular circumstances herein detailed, it certainly will deduct this total of

$977,606, either from this item, or from the item of interest on the public debt in the event that the Court shall overrule our exception to the finding of the Master in reference to the interest on the public debt. But counsel for West Virginia are confident this Court will sustain our exception to this item of interest and deny the right of Virginia to charge the same as part of the ordinary expenses of the state government.

Virginia in her original exhibit D-1 under Paragraph IV. of the decree (printed as Appendix A of this brief) gives credit against the total of the ordinary expenses therein claimed for many items of income. These credits aggregate the sum of $838,000. She recognized the fact that where moneys were paid into the state treasury, which were the result of expenditures made from that treasury and charged in this account as ordinary expenses of the state government, the account should be credited with such receipts. As hereinbefore set out, some of these receipts were moneys received from the sale of goods made by convicts in the penitentiary, moneys received from the sale of supreme court reports which were printed and sold by the state, moneys received from the sale of slaves, which under statute were transported and sold. This admission on the part of Virginia of these credits is a complete and authoritative answer to the position of the Master, that the particular source from which money was derived was immaterial to him, so far as this account is concerned (Rep. p. 134). Virginia admits the right of West Virginia to investigate the source of the moneys paid out for the items claimed by her as ordinary expenses of the state government. She thereby further admits the principle of the right to credits against this account of ordinary expenses for all income into the treasury that arose from the labor of state employees or the management of state institutions or the investment of state funds. In fact, credit should be given against this account of ordinary expenses for all income into the treasury that arose from sources other than taxes in some form or moneys borrowed.

What was the difference in principle between moneys earned by a state convict by his labor and moneys earned by the loan or investment of the state Literary Fund by its labor? Each is measured alone by the work done by it. Each is a producer. The expenses con-

nected with the work of each were paid by the state and are charged in this account as ordinary expenses of the state government. Why should not the earnings of each be treated in the same manner?

We submit that the finding of the Master on this Item 26 is erroneous, and the exception of the State of West Virginia thereto should be sustained.

Exception as to Apportionment.

The defendant further excepts to the following finding.

> "I find that the method adopted by the plaintiff of ascertaining 'the average total population,' is the clearest and most accurate approximation upon which the ordinary expenses can be apportioned to 'the average total population,' as the object to be ascertained, is the population in existence, at the time of the ordinary expenses to be apportioned, were paid, and I therefore adopt the plaintiff's method." (Rep., p. 141.)

Paragraph IV. of the decree provides that the proportion of the ordinary expenses of the state government chargeable to West Virginia, be ascertained "on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States" (R., p. 173). As understood by West Virginia, this meant the average total population of each census, beginning with the period commencing on the 19th day of March, 1823, and ending on the 31st day of December, 1860. This made five census periods, 1820, 1830, 1840, 1850 and 1860. We conceive the language of the decree to mean that the average of these five census periods should be taken. Nothing in the decree or elsewhere, so far as we can find, directed the Master to divide these expenss into four periods, one of seven years and three of ten years.

As shown by the Master's report (p. 139), the only state expense which increased in proportion faster than the population, was the item, "interest on the public debt". In fact, outside of this one item, as claimed by the plaintiff, the ordinary expenses of the state government were in proportion to the population greater in the first decade. For instance, when the population, with slaves, of Virginia in the period between 1823 and 1830 was 928,558, and of West Vir-

ginia was 136,808, the ordinary expenses of the state government, after deducting the claimed interest charged, were $3,394,301.

In the period of 1840 to 1850, when the population of Virginia had increased to 1,120,000 and the population of West Virginia had increased to 302,000, the ordinary expenses outside of this claimed interest charge, had only increased to $5,365,000. The population of West Virginia had more than doubled, but the ordinary expenses of the state government outside of the claimed interest charge, lacked one million and a half dollars of doubling. It will be observed that the first period only covered seven years and the last ten years. The interest charge of the third decade as found by the Master is greater in amount than the total charges for ordinary expenses in the first decade. The interest charge in the fourth decade exceeds in amount the total of the charges, other than interest, in the third and fourth decades. It also exceeds in amount the total of the charges in the first, second and third decades, after the interest charges have been deducted therefrom.

The percentage of the increase in the population of the territory composing the two states was greater in that which is now West Virginia. The percentage of the increase of the expenditures of the state government, outside of the claimed interest charge and the taxes under the constitution of 1851 for school purposes and the Harper's Ferry Raid of 1859, were quite uniform. As shown elsewhere herein, the interest charges were based on the extraordinary expenditures made by the Commonwealth of Virginia in the construction of railroads, canals, and other works of like nature, and in the purchase of stocks in railroad companies, canal companies, and other companies of like nature, and in banks. About $40,000,000 was expended by the commonwealth for these purposes Nine-tenths of these expenditures and purchases were made in what are the present limits of the Commonwealth of Virginia. One-tenth of these expenditures and purchases was made in what are the present limits of the State of West Virginia. It does not seem to us to be an equitable way of ascertaining "a just proportion of the ordinary expenses of the state government" to apportion three-fourths of this interest to the decade when West Virginia's population was the largest. We sub-

mit that even if the Court should overrule the exception of West Virginia to the finding of the Master, which holds that interest on the public debt is an ordinary expense of the state government, it should nevertheless sustain the exception of West Virginia to this finding of the Master on apportionment.

We further submit that the Master was not called upon to render any decision on this claim of apportionment made by Virginia, as it is plainly not included in the decree of reference.

Exceptions of Virginia to the Finding of the Master Under Paragraph IV. of the Decree.

Virginia does not file any specific exceptions to any finding of the Master under Paragraph IV. Unless they intended to insist upon the same general exceptions as set out herein under Paragraph III., Virginia has no exception to the findings under Paragraph IV. The language of Virginia's general exception would include many findings of the Master under this paragraph.

The items asked for by Virginia, and which were not allowed by the Master, consist largely of one general class, to wit: buildings erected in the present State of Virginia in connection with public institutions. The following is a list thereof:

Item 6, Deaf, Dumb and Blind Institution	$ 80,661.94
Item 11, Virginia Military Institute, new building	151,000.00
Item 12, University of Virginia, repairs and improvements to buildings, and water supply	25,000.00
Item 13, Improvements, Capitol Square	12,278.47
Item 15, Penitentiary Lot, new hospital building	13,947.48
Item 17, Medical College of Virginia, additions and improvements to buildings	25,000.00
Item 19, Eastern and Western Asylum	344,295.57
Item 20, Gun House at Alexandria	900.00
Item 21, Cannon House, Surry County	110.00
Item 22, Cannon House for Richmond Artillery	1,079.00

All of these items were either for the purchase of real estate or the erection of buildings on real estate owned by the commonwealth. The only building in the territory now West Virginia was the asylum at Weston, called the Trans-Alleghany Lunatic Asylum, which was charged to West Virginia as a *state expenditure*. If such an expenditure of money should come under the first section of the ordinance as a state expenditure, then it would be utterly inconsistent to ask that expenditures of the same kind when made in Virginia should be classed as ordinary expenses of the state government. They were permanent investments, and are still owned and used by the State of Virginia. They were not expenditures for the maintenance of the inmates of those institutions. We submit that the Master's finding thereon was absolutely correct and should be sustained.

Three other items, which were claimed by Virginia as ordinary expenses of the state government, and which were not allowed by the Master, are as follows:

Item 2, Constitutional Conventions ---	$258,906.28
Item 4, Boundary lines ----------	16,704.78
Item 5, Maps of the Commonwealth ---	16,628.04

These items are in the same class in so far as they were moneys expended for occasional acts done in pursuance of law. There were two constitutional conventions within the period, one in 1829 and one in 1851, but they were not ordinary events in any sense of the word. During the period, under special acts of the legislature, certain boundary lines between Virginia and some of her neighbors were ascertained and established, and the sum of money above named as item 4 was specially appropriated for the purpose. The ruling of the Master should be sustained for the very good reasons given by him on p. 117 of his report.

The legislature also saw fit on certain occasions to have made a map of the state. These occasions were rare, and the duty was specially performed under a special act of the legislature. They were unusual in the sense that none of these acts were done except when the legislature specially ordered it, and when the specific order was complied with the whole matter was ended. We submit that the ruling of the Master thereon was correct. (Rep., p. 118.)

PARAGRAPH V. OF DECREE.

"5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia."

The exceptions of West Virginia under this paragraph are to the finding of the Master of the "fair estimated value" of the real estate in the counties now forming Virginia and in the counties now forming West Virginia. The assessed valuation of the real estate, on June 20, 1863, in the counties of Virginia was $296.085,460.31; and in the counties of West Virginia, $82,449,252.04.

In finding the valuation of property it has been conceded by both parties that the best evidence obtainable was the assessed valuation made by sworn officers of the state, chosen for the purpose. Their sworn returns of such valuation are *primi facie* correct. The acts were judicial in their character. The only other valuation of official character was that made by the officers of the United States in taking the census of 1860; in which each person for himself put down the real valuation, as conceived by him, of his property, real and personal. This valuation was at least three times as large as the assessed valuation. However, the Master took the assessed valuation as the basis; and the question now under discussion is whether he was justified in taking fifty per cent of the assessed valuation as the fair estimated valuation of such real property. He applied this rule to the *whole of Virginia* and to fourteen counties of West Virginia. This was done on the theory that the ravages of the war had depreciated the values equally in the ninety-nine counties of Virginia, but had only affected the values in fourteen of the forty-eight counties of West Virginia. We contend this is unfair to West Virginia.

Some evidence was taken by Virginia (R., pp 739-785). This was given by witnesses who had admittedly seen but a small part of Virginia and who necessarily knew the exact condition only in a small part of the state. Historically speaking, it is a known fact that up to the 20th of June, 1863, not one-third of the counties of Virginia had been in any way touched by invading armies, and no ravages could have been committed in the other counties where the sentiment of the people was apparently unanimously in favor of the Confederate

cause. The evidence of these witnesses is, we claim, incompetent, is very vague, indefinite, and altogether unreliable. None of them were qualified by reason of travel or knowledge during the particular period to speak of the conditions except in a very small territory. The evidence shows conclusively these facts. It is not the character of evidence sufficient to overthrow the official records of the State. Virginia cannot impeach the integrity of her sworn officers in this manner. Each county had an officer called Commissioner of Revenue and some counties had two or more of these officers. It was their sworn duty to assess the properties situated therein. They had the power *to reduce assessments of real estate* where the value thereof had been reduced by the destruction of any of the buildings or things of like nature thereon. The fact that the assessments of 1863 were made after the allowance of such reductions or depreciation in values, shows the mistaken ideas or the lack of information of these witnesses. The assessing officer fixed the value at the time he saw the property, while these witnesses estimated the value of such property which they casually saw a half century thereafter.

It is a well known historical fact that in the early period of the war there was a great conflict in many parts of the forty-eight counties now forming West Virginia. This is especially true of the southern and eastern counties thereof. It is a further fact that during practically the entire period of the war a destructive internecine conflict continued in at least one-half of the counties of West Virginia between those sympathizing with the Union and those sympathizing with the Confederacy. This condition was much more destructive of property than anything that had been actually done by the armies in the present State of Virginia prior to June 20, 1863.

We submit that there is no reliable or convincing testimony in this record sufficient for the Master to reduce the value of assessed real property in Virginia one-half in order to arrive at what is termed "the fair estimated value" thereof on the 20th of June, 1863. We further submit that if the testimony is sufficient to convince this Court that fifty per cent of the assessed value of real estate in Virginia was the fair estimated value, then the same rule should apply to West Virginia, and there should have been an equal reduc-

tion of the assessed value of the lands in the counties now forming West Virginia.

The fact must not be lost sight of that up to the 20th of June, 1863, the outlook for the success of the Union armies was not particularly bright, and the belief was pretty general, at least within the lines of the Confederacy, that the separation of the states therein from the Union was complete. Many parts of Virginia in the early period of the war reaped large benefits in a money way by the opportunity of her people to sell war supplies at an advanced rate.

It is proved by the evidence of witnesses that in West Virginia there was a decided emigration of many people, according to their sympathies. Those who sympathized with the southern cause sought protection within the lines of the Confederate forces and mostly within the counties now forming Virginia. Those who sympathized with the Union sought protection beyond the Ohio River within the certain lines of Union control. Many of these never returned, but settled upon the cheap lands of the West, and were lost as citizens forever to the State of West Virginia. Virginia still retained, up to the 20th of June, 1863, her labor supply of slaves. It will be remembered that in the Virginia counties, according to the census of 1860, there were 472,000 slaves, while there were only 18,000 in the counties of West Virginia. It is further shown in the record that three-fourths of those were in the counties which, during the greater part of the Civil War, gave allegiance to the Confederate government. Thus, one state had its labor supply at hand and the other state had its labor supply either in the army of one or the other contending parties, or had seen it migrate to the West. It will be remembered that the counties of West Virginia furnished the two contending armies, or used as home guard soldiers, a force of 60,000 men out of a population of only 376,000 white persons, as shown by the census of 1860.

We respectfully insist that under these circumstances the assessed valuation of the real estate should stand as the "fair estimated value of the real property" in the two states.

Exceptions of Virginia.

The first exceptions of Virginia under this paragraph relates to the

finding of the Master of the fair estimated value of the real and personal property in the counties of Virginia as of January 1, 1861, on the ground that the same is not responsive to the paragraph or any other paragraph of the decree. This finding of the Master was made at the request of the defendant under the following clause in the decree:

> "The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the Court."

It seemed to West Virginia that January 1, 1861, was a much more proper and pertinent date on which to find the fair estimated value of property, than the 20th of June, 1863, and for that reason the defendant requested the Master to make such finding.

Virginia also excepted to the finding of the Master under this paragraph, because he included the value of slaves in his statement of personal property in Virginia, and because he adopted the assessed value thereof as the fair estimated value. We are utterly unable to see any point in either of these exceptions. Slaves constituted the most valuable personal property that Virginia had. Their productive value, as well as their salable value, was much greater than all the other personal property in the whole state. They were assessed annually by the Commissioners of Revenue, and that assessment, made by more than one hundred commissioners representing each county in the state, (all appointed by law and sworn to perform an official duty to the best of their ability), is certainly entitled to more weight than the personal testimony of a few witnesses given forty-seven years after the event. We submit that Virginia cannot at this late day impeach her own official records in any such way or manner.

The last exception of Virginia under this paragraph relates to the question whether or not these assessments were made on the basis of Confederate currency.

It is shown by a comparison of the assessments of 1860 and 1863 that there was relatively the same proportion of such personal prop-

erty as horses, sheep and cattle, and that the increase in the assessed value thereof in many counties was not noticeable, while the greatest seems only to have been a thirty or forty per cent increase. The claim by Virginia that they had been increased at least four times was found to be utterly and entirely refuted by their own records. This question was considered by the Master, and in view of the official records he found against the contention of Virginia thereon. We respectfully submit that this finding was correct. We further submit that all the exceptions filed by Virginia to this paragraph should be overruled.

PARAGRAPH VI. OF DECREE.

> *"6. All moneys paid into the Treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union."*

West Virginia excepted to the report of the Master under this paragraph, because of his refusal to allow any of the four items following as payment of money into the treasury of Virginia from counties now in West Virginia, namely:

Item 7, Dividends from Banks in West Virginia counties	$786,666.98
Item 8, Dividends and interest in Turnpike Companies in West Virginia counties	13,595.48
Item 9, Dividends from Bridge Companies in West Virginia counties	6,028.51
Item 10, Dividends from Interstate Turnpike Companies (proportion)	1,355.92

These four items aggregate $807,646.89. The Master refused to allow them on the ground that they were not public payments, but were simply dividends received by the state on stock owned by it and held in its private capacity. In view of the holding of the Master under Paragraph III. of the decree, that the purchase of the stock of banks and of turnpike, bridge and navigation companies was not a state expenditure within the meaning of the ordinance or decree, we believe that his holding in the present case is the corrct one; and if

this Court should approve his holding in that respect, we desire to withdraw these exceptions. But if this Court should hold that the purchase of these stocks by the commonwealth was a state expenditure in the meaning of the ordinance and decree, then we insist that these four items should be allowed, and that our exceptions be sustained. Certainly, if West Virginia is to be charged with the cost price of the stocks, she should be credited with the income received therefrom. The Commonwealth of Virginia, in her original account, and even in her amended accounts, filed under Paragraph III. of the decree, claimed the sum of $391.800, expended for the purpose of bank stocks, as state expenditures. In her exceptions filed to Paragraph III. no mention is made of the refusal of the Master to allow this sum on said account.

It is but human to wonder whether this apparent withdrawal of this item was caused by the showing made by the defendant under Paragraph VI. Virginia certainly must have recognized that if West Virginia was to be charged with the value of these stocks, then she should also be credited with the dividends received therefrom. The dividends received on the bank stock were very large, but those received on the stocks in the turnpike, bridge and navigation companies were so small in amount that the total thereof would have no appreciable influence upon the grand total of $1,104,000 that was expended in the purchase of these stocks, and which total sum Virginia desires to charge to West Virginia under said Paragraph III.

The Master found that

Item 1. Bonus received from Banks	$96,253.62
Item 20. Merchants and Mechanics Bank stock sold (bonus stock)	43,103.35
Item 22. Northwestern Turnpike Road Item 23. Staunton and Parkersburg Road, net tolls	12,132.12

were moneys paid into the treasury of the commonwealth, and allowed the contention of West Virginia on that point. We are again in the dark as to the contention of Virginia. Her general exception covers these items, but there was no *specific* exception to the finding of the Master thereon. There can be no real question on these points. The

finding of the Master is absolutely correct. (R., pp. 174, 177, 178.) These sums, except perhaps the tolls, were raised in another form of taxation than that usually employed. Still they were taxes, and nothing else. A license tax or a franchise tax is a tax in the meaning of this ordinance and decree. This Court has recently held that they were taxes in the meaning of the bankrupt act. (*State of New Jersey* v. *Anderson*, 203 U. S., page 483.) The language of the ordinance and of this decree is broader than the word "tax." They use the expression, "All moneys paid into the treasury of the commonwealth." Only sovereigns have a right to levy taxes; that is, sovereigns within their own jurisdiction. Here the state levied a franchise tax, in one case of money, and in the other case of stock. Then the state sold the stock and received the money therefor.

PARAGRAPH VII. OF DECREE.

"7. *The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items, and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the Restored Government of Virginia, together with the nature and description thereof.*"

West Virginia excepted to the finding of the Master because he found that on June 20, 1863, the 3418 shares of the capital stock of the Northwestern Bank of Virginia at Wheeling was worth the sum of $427,250. (Rep., pp. 189-192.) We are unable to appreciate the reasoning upon which the Master arrived at this conclusion. This bank was incorporated in 1817. The stock purchased by the state was made for two different accounts: $50,000 of stock was purchased in the years 1832 and 1833 for the Literary Fund, and the balance of $400,000 in 1837, 1838 and 1839 for the Commonwealth Fund. It is shown herein, and not disputed, that all the accounts of the state were carried either in the Commonwealth Fund, the Board of Public Works Fund, or the Literary Fund. They were all funds of the state of Virginia.

The laws of Virginia (Code of Va. 1860, chap. 58, secs. 42-3) required each of its state banks to make quarterly statements to the governor, showing therein the amount of its capital stock paid and unpaid, the value of its real estate, amount of debts due to and from it, its bad and doubtful debts, specie on hand, amount of deposits, its circulation, amount of bills on hand, rate of last dividend, and amount of surplus or contingent fund. There was no provision of law for periodical examination of banks by an expert public officer, as in these days. The only provision found in the laws of Virginia for the inspection of banks, is that contained in section 45 of said chapter 58 of the Code of 1860, wherein it is provided that an examination of the books and proceedings of any bank might be made by a joint committee of the two houses of the general assembly, or by that of either house, or by a commission appointed by the general assembly or the governor. It will be perceived that each bank was the sole judge of the value of its assets—of the value of its real estate, and whether a debt due it was bad or doubtful, etc. With such power, almost any bank, no matter how bad or doubtful its condition, could make a good showing. Modern laws, both of the Federal government, and perhaps of the most of the states, have changed all this. Experience made it necessary. Now, expert examiners are required, at short periods, carefully to examine in detail the assets of banks, inspecting each note, bond, and other details of such assets.

The Northwestern Bank, under statutes of Virginia, had its main or parent branch at Wheeling, in the county of Ohio, now West Virginia; a branch at Wellsburg, in the county of Brooke, now West Virginia; a branch at Parkersburg, in the county of Wood, now West Virginia, and a branch at Jeffersonville, in the county of Tazewell, then and now Virginia. The reports made by these branch banks were made to the parent bank at Wheeling, which made reports to state officers of Virginia of the bank as a whole, and not distinguishing among the branches. Hence, there cannot be ascertained from the books or the records of the State of Virginia the value of the assets of any one of these branches, nor indeed of the parent bank itself separately from the branches. The State of West Virginia, through

one of the counsel employed in this case, made an exhaustive search to find, if possible, the books of the Northwestern Bank at the time of the separation of the two states, or at any period near thereto. It was found that all the books had long since been destroyed.

After the war, in 1865, the parent bank and the two branches in West Virginia were converted into three National Banks, namely: the National Bank of West Virginia at Wheeling, the First National Bank of Wellsburg, and the Parkersburg National Bank. There were certain assets of the old Northwestern Bank at each of these points which the new bank declined to take. These assets were administered by what was called the Board of Commissioners of the Northwestern Bank of Virginia. They acted as liquidating commissioners. The books of all the branches, after the national banks had taken such memoranda from them as they needed, were transferred and delivered to the Board of Commissioners of the Northwestern Bank, and for years remained in the building of the National Bank of West Virginia at Wheeling; but its affairs having been finally wound up a long time ago, no especial attention was paid to these old books, and they were deposited in the basement of the building occupied by the National Bank of West Virginia. Since that time Wheeling has been subjected to some extraordinary floods, particularly the one of 1884, and the best information that could be obtained tended to show that these old books of the Northwestern Bank were then completely destroyed. Certain it is that no trace thereof could be found. At the beginning of this suit, every one of the officers connected therewith, and who had any knowledge of the affairs of the bank, were dead. West Virginia was therefore compelled to get the best evidence she could to prove these values.

It is shown by the act of the general assembly of (the Richmond government of) Virginia, and by the report of the Hon. Chester D. Hubbard, which are printed as Appendix B of this brief, that the assets of the branch at Jeffersonville, in Tazewell county, Virginia, were wholly lost to the Northwestern Bank. What were the value of these assets which were practically confiscated by the said act, cannot now be definitely ascertained. The Northwestern Bank claimed a loss thereby of 1642 shares, of the par value of $164,200. (See statement

submitted by Mr. Hubbard in said Appendix B.) The provision of section 7 of the said confiscatory act of the Confederate government of Virginia, limiting the amount of redemption of certain notes to $180,000, seem to show that the estimate of the loss of the Northwestern Bank of $164,200 was not too high. The provisions of sections 2 and 4 of the said act are sweeping; they take from the Northwestern Bank every item of property it owned or held in its Jeffersonville branch.

Whatever the loss was—whether $164,200 or $180,000—it was a large loss, *and the Master takes absolutely no account whatever of this large loss* in arriving at the value of this bank stock as of June 20, 1863. *The best evidence, in our opinion, as to the value of these stocks, was the price put upon them by the National banks which took over the assets.* This was done in March, 1865. In the case of each of the three banks, to wit: National Bank of West Virginia, First National Bank of Wellsburg and the Parkersburg National Bank, the same value was placed upon the stock, that is to say, *fifty cents on the dollar.* At fifty cents on the dollar 3418 shares would have been worth $170,900.

By reference to the said report of Mr. Hubbard, which he made by the direction of the Board of the School Fund of West Virginia, it appears that on March 2, 1865, when these national banks were formed, the directors of the Northwestern Bank charged to the State of Virginia for the loss of the assets of the branch at Jeffersonville the amount of 1642 shares of the stock formerly held by the State of Virginia and canceled that amount, leaving 1776 shares, for which stock was given to West Virginia by the three national banks at the rate of *fifty cents on the dollar.* The stockholders other than the state only received stock in the new banks at the rate of fifty cents on the dollar. This fact shows their good faith in thus dealing with this proposition.

In addition to the 1776 shares of stock, for which West Virginia received stock in the new banks at the rate of fifty cents on the dollar, she also received stock in the new banks at the same rate for 326 shares of bonus stock given by the bank to the state of Virginia, and this makes the total of 2102 shares for which West Virginia received

stock in the new banks of the par value of $105,100. In addition to that West Virginia received out of the remaining assets of the Northwestern Bank the sum of $10,510 on the first day of July, 1867; the sum of $10,510 on the first day of August, 1868, and the sum of $10,510 on the first day of July, 1871. It is not denied that these amounts are all that were received by West Virginia in stocks or moneys out of the assets of the Northwestern Bank of Virginia upon its dissolution and winding up. The total was $136,630.

Suppose for a moment that West Virginia was negligent in permitting the stockholders of the Northwestern Bank to charge up the assets of the branch at Jeffersonville to the state holdings of stock, and that the state should have received also fifty cents per share on these 1642 shares, this would add the sum of $82,100 to the amount heretofore conceded. But we do not think that negligence can be reasonably charged to West Virginia in this matter. How could she prevent the State of Virginia from seizing the property of the branch at Jeffersonville, which was in her own territory and dominated by the arms of the Confederate States? This property of the Jeffersonville branch *was never transferred to West Virginia by Virginia. Virginia kept it and made us of it.* What reasonable claim can, therefore, be made that it should be charged to West Virginia?

We know of no better evidence that could be obtained than these acts of the parties at the time. They were dealing with the matter in a business way and on a business basis. The Master, as has been said, makes no deduction whatever for the loss of these assets of the branch at Jeffersonville, but on the contrary charges West Virginia with the stock as if this great loss had not happened. The Master also goes on the assumption that the fact of the payment of 7½ per cent dividend for a few years prior to the war shows that this stock was of the value of one-fourth more than par. This position is clearly untenable. *The sale by the state in 1857 to this bank itself of 1082 shares for $113,000 shows that the position taken by the Master cannot possibly be sound.*

Virginia, in 1857, when this stock was earning this 7½ per cent rate, was willing to take and did take less than $105 per share for the

stock, the par value of which was $100 per share. Hence, we cannot conceive how the Master could say that, amidst the throes of war, and especially at the time when the destiny of the country hung in the balance, as it did in June, 1863, this stock was worth $125 per share. It must be remembered that banks prior to 1863 and banks of the present day did business on different conditions. Supplemental Exhibit No. 9, filed with the Master after the record was printed, and upon which he based his finding in this particular in part, shows that the deposits in this bank were less than one-fourth of its capital stock, and further shows that the money-making powers of these banks in Virginia prior to the war lay in their exclusive right to issue Virginia notes, which notes passed as the money of that day. Certainly, by the second day of March, 1865, when this bank was nationalized, it was a recognized fact that this power to issue this money was gone; the immense amount of such notes which it had outstanding reduced its assets one-half. Is it to be presumed that, in June, 1863, before the battle of Gettysburg and before the fall of Vicksburg, when everything hung in the balance, the conditions of 1859 and 1860, so far as this bank is concerned, had continued just the same? The Master says that there is a presumption of such continuance of conditions, when there is no proof to the contrary. The Court will certainly take judicial notice of the fact that in this instance there is written on history's pages an immense amount of proof to the contrary. The greatest war of modern times, directly involving the territory of the two states, had drained into their soldiery the largest part of the able-bodied men who lived within the country reached by this bank. Can it be presumed that under these conditions the value of these bank stocks would have continued and grown twenty per cent greater in 1863 than they were in 1857?

The Master draws a comparison between the Fairmont Bank and the Northwestern Bank. He certainly overlooked some important matters in such comparison. He takes the statement made by West Virginia that Fairmont stock was worth par as proof that the stock of the Northwestern Bank must be worth more than par. The concession made by West Virginia as to the value of the Fairmont Bank stock was based solely and alone on the fact that when the Fairmont

Bank was nationalized in 1865, the stockholders thereof received stock in the new National Bank at par for their holdings in the Fairmont Bank. This concession on the part of West Virginia only proves that she was willing to pay for this stock every cent's value she received in it, which value is that which the persons in charge of the banks in 1865 fixed as the value of the stock, when they became incorporated under the laws of the United States. It is certainly reasonable to presume that when these banks became national banks, under the strict inspection given by the United States, they put a just value on the properties; and it is further reasonable to presume that when the stockholders in charge of the bank gave the state the same treatment that they gave themselves and other stockholders, they were acting justly. The comparison made by the Master between the Fairmont Bank and the Northwestern Bank on the basis of the concession that the Fairmont stock was worth par thus falls flatly to the ground. If the concession as to the Fairmont Bank can be regarded as proving anything, certainly the concession made as to the Northwestern Bank should be worth as much, and prove what it admits. Moreover, the Fairmont Bank had no such loss as was suffered by the Northwestern. A considerable part of its assets were not seized and confiscated by the enemy in war. This fact the Master also overlooks in his comparison.

We might recapitulate this case as follows: Virginia conceded in 1857 by her sale that the stock was worth only $105. A great war came on; there was a great upheaval, involving most of the territory served by this bank; one branch, with a capital stock of $150,000, was wholly lost to the bank; and yet the Master finds that the stock was worth twenty per cent more than the value placed upon it in 1857 by the Virginia state officers. The Master says that this conclusion is largely arbitrary, but he believes it reasonable. We certainly cannot agree with the latter phrase.

Exception by Virginia Under Paragraph VII. of Decree.

Virginia's exception under this paragraph is based on the finding of the Master that West Virginia received nothing in money from Virginia. The Master finds that there was received by West Virginia

from the restored government of Virginia a total of $170,771.46. These moneys were given over to West Virginia by the act of February 4, 1863, passed by the legislature of the loyal restored State of Virginia (App., p. 131). The entire amount of money so turned over was collected by taxation by the restored government from the people and properties of the territory which afterwards formed West Virginia. All of it had been acquired after the organization of the restored government. This is necessarily true, as the restored government had no money whatever when it was organized, and could only raise money by the collection of taxes within the territory where its authority was recognized.

It will be remembered that the act of February 3, 1863 (App., p. 128), transferred to the new state, when it should become one of the United States, certain described properties belonging to the State of Virginia within the boundaries of the proposed State of West Virginia. It further provided that if the new state was formed, and that grant took effect, the new state should account for the same in a settlement between the two states.

After that act had been passed and become law the legislature passed the act of February 4, 1863. By an act passed on May 14, 1862 (App., p. 128), there was appropriated to the new state the sum of $100,000; and this act provided in part as follows:

> "All of the appropriations made by this act shall be charged to the State of West Virginia in the settlement between the States of Virginia and West Virginia."

The act of February 4, 1863, contained the following provision:

> "That the act passed May 14, 1862, making an appropriation of $100,000 to the State of West Virginia be and the same is hereby repealed."

We thus see that it was plainly the intention of the legislature of Virginia not to charge to the new state this sum of $170,771.46. This is directly shown by the passage of the act of February 4, 1863, after the act of February 3, 1863, and by the repeal of the act of May 14, 1862. This was but simple justice to the new state. All this money had been collected on the property and from the citizens of the new state. It was specifically provided in the act of February 4,

1863, that all moneys which had been collected from the counties of Virginia outside of the new state, should be included in a settlement to be made by the auditor of Virginia, and also that all moneys that up to the same time had been expended in such counties should be included in another settlement, and the surplus expended, after deducting the moneys expended in such counties from the moneys collected from such counties, should remain the property of the Commonwealth of Virginia. This plainly shows that it was the intention of Virginia to separate the moneys then in the treasury according to the fact whether its sources were the counties of the new state or the counties of the old state. If it had been collected from the people of the counties of the new state, they justly said that the new state was entitled to it. The converse was also true. The moneys which had been collected from the counties of the old state should be retained by the restored government of Virginia. It was a gift indeed, but still a gift which in justice rightly belonged to the state to which it was given. It was no Indian gift: there was no expectation of any return.

PART III.

Causes of Separation of West Virginia.

Part I. of defendant's brief deals with questions of law which do not go to the merits of the case, and Part II. deals with the exceptions of the complainant and defendant and the report of the Master. This part is intended to deal with the principles of law applicable to the facts admitted by the pleadings, developed before the Master, and matters of common history and knowledge of which the Court takes judicial notice. Such an argument must inevitably involve some repetition in respect of questions covered by Part II.: but this is avoided as far as possible.

1 Rule of Construction to be Applied in This Case.

This Court said in *Scott* v. *United States* (12 Wallace 443), which involves the construction of a contract between the Government and an individual and the ascertainment of the intent of the parties:

> "In cases like this it is the duty of the Court to assume the standpoint occupied by the parties when the contract was made—to let in the light of surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning."

This settled doctrine, so admirably stated by the Court, is peculiarly applicable to this case, both in the construction of the Wheeling Ordinance of August 20, 1861, and of Section 8 of Article VIII. of the Constitution of West Virginia, which was adopted by the Convention that assembled pursuant to the provisions of the Ordi-

pance and under which West Virginia, with the consent of Virginia, was admitted into the Union as a State. The true construction of these instruments and a just determination of the case, cannot be reached without reference to the relations of Northwestern Virginia and her people and Eastern Virginia and her people, territorially and sentimentally, and to the circumstances under which the movement for the formation of the new State was inaugurated and carried to consummation.

2. PHYSICAL CHARACTERISTICS OF EASTERN VIRGINIA AND NORTHWESTERN VIRGINIA.

Some elements in the problem are not susceptible of proof by the testimony of living witnesses, but are susceptible of accurate ascertainment from the history of that period. This Court will take judicial notice of the physical fact that Northwestern and Western Virginia within the boundaries described by the Ordinance and the Constitution is remote from tidewater, and separated from Eastern Virginia by the Alleghany Mountains: that this region which became the State of West Virginia lies mainly on the western slope of the Appalachian Mountains and is bounded on the north by Ohio, Pennsylvania and Maryland, on the east by Pennsylvania, Maryland and Virginia, on the south by Virginia and Kentucky, and on the west by Kentucky and Ohio.

> "The Alleghany watershed is in the eastern portion of the State, all except eight of the counties lying on the western slope within the Ohio Basin. In the higher parts of the State, where Pendleton, Pocahontas and Randolph Counties join, five rivers rise which flow across the State—two finally flowing eastward into the Atlantic and three westward into the Ohio. The Ohio forms the western boundary and is navigable throughout its length. The eastern part of the State is drained by the Potomac and its tributaries. The Cheat and Monongahela flow through the northern counties and the latter is now navigable as high up as Fairmont, in Marion County. The Greenbrier and the Elk form the watershed to the southwest and join the Great Kanawha, which flows northwest into the Ohio. The Great

Kanawha is navigable for 96 miles from the Ohio. The Big Sandy, flowing northwest, forms the southern boundary of the State. The river system of the State has been improved somewhat for navigation by government engineers, but the interior rivers will always be more valuable for their water power than for facilities of navigation" (See "West Virginia," the "Americana," published by "Scientific American").

3. COURT MAY RESORT TO SPEECHES OF CHAIRMAN OF COMMITTEE REPORTING A BILL AND OF AUTHOR OF THE BILL.

We are fully mindful of the rule that in construing an Act of Congress the court does not consider itself at liberty to recur to the views of individual members of either body in debate; or to consider the motives which influenced them for or against the passage of the measure. The rule has not always been observed here, and moreover, is not without exceptions.

What is said by the Chairman of a Committee of either body in reporting a measure as to its purpose and meaning, has been resorted to by the Court in aid of its construction. The same is true in respect of the observations of the author of a measure in exposition of its provisions. And here we, therefore, feel at liberty to quote from the remarks of Senator Wade, Chairman of the Committee on Territories of the Senate, who reported the Bill for the admission of West Virginia into the Union (Congressional Globe, Part 1, 37th Congress, 2d Session, p. 3038).

4. SPEECH OF SENATOR WADE IN SUPPORT OF ACT FOR ADMISSION OF WEST VIRGINIA.

Senator Wade said:

> "I have looked at the condition of things in Western Virginia, and I have come to the conclusion that it is impossible for the people of Eastern and Western Virginia to live together in harmony and peace. It is not a new controversy among these people. When I came to investigate it, I find that it has existed for a long period of years, much of it probably growing out of

the entire isolation of the two sections, for there is really no communication between the east and west. As Governor Pierpont remarked to me, 'We have no communication whatever, except it be furnishing a few members of the Legislature, and a few inmates of their penitentiary.' In other respects, in commercial feeling, in political feeling, in association, they are entirely isolated. On this subject of slavery they feel entirely different. There is an animosity between them that is more intense, I believe, from what I gather from the best men of that section, than that which exists between any of the northern and southern States. Under these circumstances the question is, shall they be compelled to be joined with the other portions of the State where they will undoubtedly be put under the ban of a hostile legislation for years? They complain that they have been heretofore. It is a standing complaint with them that while taxes and burdens have been imposed upon them by the vast majorities of the eastern section, for internal improvements and the like, they have been awarded no benefit from them whatever, and this has aggravated the difference between them."

5. SPEECH OF SENATOR WILLEY.

Senator Willey, elected to the "Restored" Legislature of Virginia, and the author of the Bill to admit West Virginia as a State (Cong. Globe, Part 4, 37th Cong., 2nd Session, p. 3038), said:

"Sir, it is with pain that I am compelled to take this stand, but I am justified in doing it. These people have looked for sixty long years to this day. Time and again have the sections of Virginia been upon the eve of an outbreak, of an insurrection. Criminations and recriminations have sounded in our legislative halls at every session of the Legislature for the last thirty or forty years. Threats of violence have been hurled by one section at the other. And today, when the loyal people come with a united voice, having fulfilled all the requisitions of the Constitution and all the forms of the law, and I stand here, where my colleague does not stand, representing the voice of the people of Virginia, who ask for freedom, who ask for severance from the

eastern section of the State to whom we have been in bondage in a great degree for fifty or sixty years, he gets up here on the very eve, as I have reason to believe, of the passage of the bill, when the Senate of the United States is about to bestow upon us the long prayed for boon, and he interposes an objection, to postpone and defer our long-cherished hopes and desires.

"Now, sir, I wish to make another remark in answer to the Senator from Illinois. He seems to have fallen into the mistake, common to almost every person, that this movement was conceived in a desire to separate ourselves from the disloyal portion of the State of Virginia, that it grew out of our national difficulties, out of the secession of Virginia from the Federal compact. No, sir; no. These circumstances may have precipitated action upon it: they may have given us the opportunity to effect the long-cherished desire of our section of the State; but this controversy is older than I am; I have heard it ever since I can remember anything. It grows not out of these national dissensions; it grows not out of loyalty or disloyalty to the government: it grows not out of this question of secession; but it grows out of the social, geographical, commercial, industrial distinction and antagonisms that never can be reconciled by the power of man. The Almighty, with His own eternal hand, has marked the boundary between us. We live upon waters that flow in the valley of the Mississippi; our eastern brethren live upon waters that flow into the Potomac and the Chesapeake; and there is a chain of impassable mountain barriers between us that prevent, and will forever prevent, all connection, all social relations, all interchange of traffic and commodities by any convenient means of transportation. Owing to these facts, we ask this separation, and we place it upon these large national grounds; not upon the question of secession and disloyalty. If those were the only questions at issue, I would say to the western people, as I have hitherto said to them, stand fast, not only until the Union is restored, but until all Virginia again is made loyal to the national flag, and until we all dwell together again beneath its ample folds in peace and in security. But, sir, we never can dwell

> in harmony, not because now we are separated by principles of secession and anti-secession or loyalty and disloyalty, but because the Almighty, with His own hand, has placed barriers between us that separate our trade and our intercourse, because our social relations are different, because our places of market are different, because our industrial interests are different, and because, on account of these facts, our internal resources have never been developed, and never can be developed while we are connected with Eastern Virginia."

Again he said:

> "It is said, 'Whom God hath joined together, let no man put asunder.' The reverse is true, whom God hath put asunder, let no man attempt to put together. There is no identity of interests, there is no homogeneity between the people of the valley and the people west of the Alleghany Mountains. And we are today fulfilling that remarkable prediction of Mr. Webster, that whenever there was an attempt to withdraw Virginia from the Union, it would be seen that the inhabitants living upon the waters of that State which flow into the Valley of the Mississippi would inevitably go with the people of that valley."

This was said in opposing the amendment reported to the committee which added 140,000 people and several counties to the proposed State. He further said in support of the amendment to strike out the additional counties which had been added by the committee (p. 3037):

> "By so doing you secure a new State, that will be perfectly homogeneous and identical in interests with the great States of Ohio and Pennsylvania; the great breakwater which the selfish policy of the eastern government of Virginia has always interposed between those connections across West Virginia will be swept away, and the people of Ohio, Pennsylvania, and West Virginia will be one people in interest, living together harmoniously; and the great resources of that section of the State will no doubt be speedily developed; while all this can be done without detracting one iota

from the interest, the welfare, the rights, or the privileges of the eastern section of the State."

6. SPEECH OF DANIEL WEBSTER.

The historical fact must be remembered, also, that the people of West Virginia were not in sympathy with the institution of slavery and were opposed to secession. Mr. Webster recognized the natural and abiding commercial isolation of western Virginia from eastern Virginia, and in a speech which he made, to which Senator Willey refers, at the laying of the corner stone of the addition to the capitol here in 1851, he warned the people of Virginia against the issue of disunion raised by Mr. Calhoun. After appealing to the people of Virginia, and especially to the men of "James River and the Bay" and to the men "beyond the Blue Ridge," he said:

> "And ye men of western Virginia, who occupy the great slope from the top of the Alleghanys to Ohio and Kentucky, what benefit do you propose to yourselves by disunion? If you 'secede,' what do you 'secede' from, and what do you 'accede' to? Do you look for the current of the Ohio to change and to bring you and your commerce to the tidewaters of eastern rivers? What man in his senses can suppose that you would remain a part and parcel of Virginia a month after Virginia should have ceased to be a part and parcel of the United States?"

7. CONDITIONS AT THE TIME OF CREATION OF WEST VIRGINIA.

When the great transactions occurred which are under review, the Confederate States of America had been formed. The Ordinances of Secession had been passed by South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana. Virginia had passed an ordinance of secession, had borrowed $1,000,000, had called for 10,000 men to serve for twelve months and had arranged with the Confederate government for admission to the Confederacy, and in the meantime that her troops should, under that government, be employed against the United States. Her troops had seized the Norfolk and Gosport Navy Yards, the arsenal at Harper's Ferry, the Customs Houses, and other property of the United States within her borders;

had hauled down the flag of the United States and hoisted in its place another. President Buchanan in a message to Congress had taken the position that there was no power in the Federal government under the constitution to coerce a state. Fort Sumter had been surrendered.

President Lincoln had called for 75,000 troops to serve three months. The battle of Bull Run had been fought in which the Federal troops were disastrously defeated. The "New York Tribune," edited by Mr. Greeley, exercising a most potent influence upon public opinion, advocated a peaceful separation of the states determined to withdraw, and many eminent men of undoubted love for the Union in both parties seemed to be of the same opinion. There was grave doubt throughout the country as to the ultimate result. *The people of West Virginia could not be blind to the fact that if the Confederacy should be established, that territory would, unless action were taken, be irrevocably a part of that Confederacy.*

Isolated from eastern Virginia, and differing in sentiment from her people in respect to the right of secession and the institution of slavery, her people are not to be justly chided here or elsewhere for embracing that opportunity to become a state in the Union. In this situation, is to be found the genesis of West Virginia; and in the light of this situation, her people are to be judged and her compacts and "constating" instruments are to be construed.

The Rule of Public Law in Regard to the Apportionment of the Debt of a State After Its Division.

1. THIS COURT HAS NEVER DECIDED THAT WHEN A STATE IS DIVIDED THE DEBTS OF THE ORIGINAL STATE SHOULD BE RATABLY APPORTIONED BETWEEN IT AND THE NEW STATE.

It has been assumed, and is now assumed by counsel for the complainant, that this Court has so decided. They cite in support of their contention the opinion of the Court delivered by Mr. Justice Field in *Hartman* v. *Greenhow*, 102 U. S. 672; and *Antoni* v. *Greenhow*, 107 U. S. 769. It may be said here that the opinion of Mr. Justice Field in the latter case was a dissenting one. The question was not in any wise involved in either case. The Hartman case was as follows:

By act of March 30th, 1871, known as the "Funding Act," by which Virginia made an adjustment with her creditors under which she funded two-thirds of her debt and issued bonds for the same, it was provided that the coupons should be made payable to order or bearer, and it was declared that the coupons should be payable semi-annually, to be "receivable at and after maturity for all taxes, debts, dues, and demands due the state," and that this should be so expressed on their face. Hartman, a resident of Richmond, and a citizen of Virginia, on the 5th of April, 1878, was indebted to the state for taxes to the amount of $26.53. On that day he tendered to the treasurer of Richmond, who was by law charged with the duty of collecting the taxes of the state in that city, certain interest coupons, which were overdue, amounting to $24, cut from bonds of the state, (which bonds he did not own), issued under the act of 1871, and $2.53 in lawful money of the United States in payment of the taxes. The treasurer refused to accept the coupons in payment of the taxes without first deducting therefrom the taxes imposed by Virginia on the bonds to which they were originally attached, and of which the holder of the coupons was not the owner. Upon this refusal, he applied to the Supreme Court of Appeals of Virginia for a writ of mandamus to the treasurer to compel him to receive the coupons, with the money mentioned, in full discharge of his taxes, without any deduction from the coupons for the taxes upon the bonds. The Court of Appeals of Virginia issued a rule or an alternative writ upon the treasurer, he answering that the General Assembly for many years had exercised the right to tax all bonds, choses in action, and other evidences of debt, including bonds of the state; that the taxes assessed upon the latter bonds were according to their market value, the amount being fixed at 50 cents on the $100 of such value; that the law required the taxes to be collected when the interest on the bonds was paid, and made it a high penal offense for any officer to receive coupons in payment of taxes without deducting from their face value the tax levy upon the bonds from which they were taken, etc.

The judges of the Supreme Court of Appeals of Virginia were equally divided upon the question. This operated as a denial and the

petition was denied. The court, however, certified that on the hearing of the case there was drawn in question the validity of the statute of the state authorizing the tax upon the bonds and requiring its deduction from the coupons, on the ground of its repugnancy to the provision of the constitution of the United States, prohibiting any legislation by the states impairing the obligation of contracts; and that the decision was in favor of the validity of the state statute and against the right claimed by the petitioner under the provision of the constitution of the United States.

Thereupon the case was brought to this Court and manifestly it involved only the question of the right of plaintiff in error, Hartman, to pay his taxes with the coupons and the added money. This, by the terms of the law, providing for the issue of the bonds and coupons and by the terms of the coupons themselves, he was entitled to do. The Court based its judgment sustaining the right of the plaintiff in error to pay his taxes with coupons on the authority of *Murray* v. *Charleston*, 96 U. S. 432, saying:

> "This decision would be decisive here, but the present case is still stronger for the creditor. The Funding Act made the bonds issued under it payable to order or bearer, and made the coupons payable to bearer. They were so far distinct and independent contracts that they could be separated from each other and transferred to different hands."

So it is held:

> "We are clear that this act of Virginia of 1876 (Sec. 117), requiring the tax on her bonds, issued under the Funding Act of March 30, 1871, to be deducted from the coupons originally attached to them when tendered in payment of taxes or other dues to the state, cannot be applied to coupons separated from the bonds, and held by different owners, without impairing the contract with such bond holders, contained in the Funding Act, and the contract with the bearer of the coupons."

Mr. Justice Field said, however, in the opinion:

> "During the war a portion of her territory was separated from her, and by its people a new state, named

West Virginia, was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But as the whole state had created the indebtedness for which the bonds were issued, and *participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness* should be assumed by that part which was taken from her and made a new state. Writers on public law speak of the principle as well established, that where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them. On the subject Kent says: 'If a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by *special agreement*, their rights are to be enjoyed and their obligations fulfilled by all the parts in common.' 1 Com. 26. And Halleck, speaking of a state divided into two or more distinct and independent sovereignties, says: 'In that case, the obligations which have accrued to the whole before the divisions are, *unless they have been the subject of a special agreement*, ratably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice of nations.' International Law, chap. 3, sec. 27." (Italics ours.)

In *Antoni* v. *Greenhow*, 107 U. S., p. 770, Mr. Justice Field, in his dissenting opinion, incorporated very much the same observations, referring to the authorities cited by him in *Hartman* vs. *Greenhow*, *supra*. The subject was not involved in either case. If Virginia had never been divided, under the same legislation and upon the same state of facts, the question befoe the Court would have been precisely the same.

We are constrained, albeit with the utmost reverence for the memory of Mr. Justice Field, to say that, in both opinions, his observations with respect to the liability of West Virginia, upon the rules of international law, for a proportion of the public debt of Virginia, prior to January 1, 1861, seem entirely *obiter*.

2. THE TRUE RULE OF PUBLIC LAW IN CASE OF THE DIVISION OF A STATE. GENERAL DEBTS ARE APPORTIONED ON THE BASIS OF TAXABLE VALUE. LOCAL DEBTS ARE ASSUMED BY THE STATE FOR THE EXCLUSIVE BENEFIT OF WHOSE TERRITORY THEY WERE INCURRED. THE AUTHORITIES.

Publicists seem to be in entire accord as to some phases of debt succession between states: First, that when one state and its provinces, if it have any, are absorbed by another, either through subjugation, or through voluntary merger, the absorbing state is liable for the whole debt of the extinguished state. Second, that when a state is broken up into separate states, the original state personality having become extinct, the separate states thus formed are each bound for a proportional amount of the debt of the original state. Third, where a state is broken up into fragments, and separate portions of it are absorbed by surrounding states, they are liable for the debts of the original state.

(*a*) HALL.

Mr. Hall, who has been frequently quoted by this Court, and who certainly was a discriminating and learned writer upon the law of nations, says at page 78:

> "When a *new state* splits off from one already existing, it necessarily steps into the enjoyment of all rights which are conferred upon it by international law in virtue of its existence as an international person, and it becomes subject to all obligations which are imposed upon it in the same way. No question, therefore, presents itself with respect to the general rights and duties of a new state. What, however, is its relation to the contract obligations of the state from which it has been separated, to property belonging to and privileges enjoyed by the latter, and to property belonging in common, before the occurrence of the separation, to subjects of the original state in virtue of their status as such, when some of them after the separation become subjects of the new state?
>
> "The fact of the personality of a state is the key to the answer. *With rights which have been acquired*

and obligations which have been contracted, by the old state as personal rights and obligations the new state has nothing to do. The old state is not extinct; it is still there to fulfill its contract duties, and to enjoy its contract rights The new state, on the other hand, is an entirely fresh being. It neither is, nor does it represent, the person with whom other states have contracted; they may have no reason for giving it the advantages which have been accorded to the person with whom the contract was made, and it would be unjust to saddle it with liabilities which it would not have accepted on its own account. What is true as between the new state and foreign powers, is true also as between it and the old state. From the moment of independence all trace of joint life is gone. Apart from special agreement no survival of it is possible, and the two states are merely two beings possessing no other claims on one another than those which are conferred by the bare provisions of international law. And as the old state continues its life uninterruptedly, it possesses everything belonging to it as a person, which it has not expressly lost; so that property enjoyed by it as a personal whole, or by its subjects in virtue of their being members of that whole, continues to belong to it. On the other hand, rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, *obligations contracted with reference to it alone,* and property which is within it, and which has theretofore a local character, or which, though not within it, belongs to state institutions localized there, transfer themselves to the new state person.

"Thus treaties of alliance, of guarantee or commerce, are not binding upon a new state formed by separation, and it is not liable for the *general* debt of the parent state. * * * * It is saddled with local obligations such as that to regulate the channel of a river or to levy no more than certain dues along its course, and *local debts,* whether they be debts contracted for local objects, or debts secured upon local revenues, are binding upon it."

On page 80 of his work on International Law is found a note upon the subject of this particular phase of law which is peculiarly instruc-

tive, for his comments upon the indefiniteness with which Grotius and other authors named have written upon it. For the convenience of the Court, it is herein incorporated:

> "The subject is one upon which writers upon international law are generally unsatisfactory. They are incomplete and they tend to copy one another. Grotius, for example, says that if a state is *split up*, 'Anything which may have been held in common by the *parts* separating from each other must either be administered in common or be ratably divided.' De Juri Belli et Pacis, lib. II, c. IX.; Section 10, Kent (Comm. i. 25) does little more than paraphrase this in laying down that 'If a state should be divided in respect of territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed and those obligations fulfilled by all the parts in common.' Phillimore quotes Grotius and Kent and adds: 'If a nation be divided into *various distinct societies*, the obligations which had accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the parts; 1 sec. CXXXVII.'"

Mr. Hall adds (and it is certainly justified):

> "It is difficult to be sure whether these writers only contemplate the rare case of a state so *splitting up*, that the original state person is represented by no one of the factions into which it is divided, or whether they refer also to the more common case of the loss of such portion of the state territory and population by secession, that the continuity of the life of the state is not broken. If the former is their meaning, their doctrine is correct so far as property and monetary obligations are concerned; if not, it would be hard to justify their language even to this extent. No doubt the debt of a state from which another separates itself ought generally to be divided between the two proportionately to their respective resources as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by a diminution of the state indebted to them. But the obligation is a moral, not a legal one. The fact

remains that the *general debt* of a state is a personal obligation. *The case also of the creation of a new state out of a part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one state to another.* (Italics ours.) When the latter occurs at least as the result of conquest, it is not usual to take over any part of the *general debt* of the state ceding territory. The case of Belgium, which took over a portion of The Netherlands debt, is scarcely in point. The Treaty of 1839 (De Martens' Nouv. Rec. XVI, 782), by which the division of the debt was effected, was part of a general settlement of the countries in question made at the dictation of Europe with a view of dealing with all the interests concerned in the most equitable and advantageous manner and not with the bare object of enforcing law. The true rule is recognized by Halleck (i. 76), who distinguishes the case of a state which is so split up as to lose its identity from that of a state which suffers dismemberment without losing its identity. 'Such a change,' he says 'no more affects its rights and duties than a change in its internal organization or in the person of its rulers. This doctrine applies to debts due to as well as from the state and to its rights of property and treaty obligations except so far as such obligations may have particular reference to the revolted or dismembered territory or province.'"

In the brief of the learned counsel who formerly appeared as *amicus curiae*, but now appears for the bond-holding creditors of Virginia, it is said (page 20):

> "Among the writers on public law referred to by the learned justice (whose opinions concurred with the view expressed by him) there may be mentioned the following, citing Puffendorf, Phillimore, Wheaton, Moore, Wharton, Oppenheim."

(*b*) OPPENHEIM.

It is justly conceded that Oppenheim is a learned, accurate and discriminating publicist. He says (sec. 84):

> "When, in consequence of war or otherwise, one state cedes part of its territory to another, or when a

part of the territory of a state breaks off and becomes a state and an International Person of its own, succession takes place with regard to such international rights and duties of the predecessor as are *locally connected* with a part of the territory ceded or broken off and with regard to the fiscal property found on that part of the territory. It would only be just if the successor had to take over a corresponding part of the *debt* of its predecessor, *but no rule of international law concerning this point can be said to exist although many treaties have stipulated a devolution of a part of the debt of the predecessor upon its successor.* Thus, for instance, Articles 9, 33 and 42, of the Treaty of Berlin of 1878 stipulate that Bulgaria, Montenegro and Servia should take over a part of the Turkish debt."

He adds, in a foot-note:

"Many writers, however, maintain that there is such a rule of international law. (See Huber, Nos. 125-135 and 205, where various treaties are enumerated.")

(The italics are ours.)

(*c*) GLENN.

In Glenn's Work on International Law (Hornbook Series), page 36, under the head "Effect of Change of Sovereignty—Upon the Public Right and Obligations," it is said:

"Three classes of cases arise: (*a*) When a new and independent state is formed by separation from an existing state; (*b*) When a portion of the state is lost by cession; (*c*) When a state is wholly absorbed.

"In the first case, two separate and distinct international persons exist instead of one and the new state has nothing to do with the personal rights and obligations of the parent state, which still possesses its identity. So also the parent state remains in sole possession and enjoyment of its separate property and the rights connected therewith. Treaties of alliance and guarantee of commerce are not binding upon the new state, nor is it liable for *the general debt of the parent state.* The new state comes into possession of rights, including those under treaties and *obligations, connected with the property within it.* It is entitled to the privileges of

navigating rivers that its citizens possess by virtue of being citizens of the parent state and is bound by the obligations connected therewith, such as regulations in regard to the dues, etc. It becomes liable for *local debts, including those for local objects,* and those *secured by local revenues.*" (Italics ours.)

(*d*) HANNIS TAYLOR.

Mr. Hannis Taylor, who is a writer of great research, and is quoted in the brief of the learned counsel for the bond-holding creditors, in his work on International Law, Section 166, says:

"*When severed territory becomes a distinct state—local rights and obligations.*—A narrower and more technical rule prevails when the parent state is deprived of a portion of its territory *which is erected into an entirely distinct political community.* The cogent reasoning in such a case is that as a man who loses an arm or leg in battle is not thereby relieved of any part of his obligations, so a state that is so dismembered as to suffer no loss of identity remains bound as before for its entire general indebtedness. 'Such a change,' Halleck says, 'no more affects its rights and duties, than a change in its internal organization, or in the person of its rulers.' This doctrine applies to debts due to as well as from the state, and to its rights of property and treaty obligations, *except so far as such obligations may have particular reference to the revolted or dismembered territory or province.*" (Italics ours.)

"In other words, as the old state continues its corporate life without interruption, it retains all general state property, and all general benefits resulting from treaties with full liability for all *general* obligations with which the new creation taken from its side may disavow all legal connection. The new state on its part carries with it *only local obligations,* whether *contracted for local objects* or secured by a lien on local revenues, and such local duties as arise out of agreements to maintain the channel of a river, or to levy no more than certain tolls along its course. As a compensation for such burdens the new state is entitled to property within it of a local character, or to such, not within it, as belongs to state institutions localized

there, and to the privileges arising from treaties specially contracted for the benefit of its territory," etc.

This certainly has the merit of clearness. Summarizing, he says (Section 168):

> "After a careful review of all the authorities the general statement may be made (1) that no matter whether a state is entirely extinguished by a division into two or more distinct states, or (2) whether it loses its identity by being absorbed into another state, or (3) whether a state without a loss of its identity has a portion of its territory taken from it to form an integral part of another state, or (4) whether such severed part is erected into an entirely new and independent state, all local charges, and guaranteed debts to which certain domains and their revenues are dedicated, survive as charges upon the localities to which they relate, with their equities unimpaired. In the case first named, the *general debt* of the state should certainly be ratably binding, morally, if not legally, on its several parts; in the second it passes as a whole to the absorbing state; in the third the acquiring state should assume a ratable proportion of it; and in the fourth, every principle of equity and good conscience requires that it should be provided for out of the common state property and the residue divided in proportion to the revenues of the two distinct commonwealths. In the notable case of West Virginia that obligation, though formerly recognized, has never been discharged."

He seems to coincide, so far as the moral obligation is concerned, with Hall, Oppenheim and other writers; and to agree with them also that there is no rule of International Law which makes it a *legal* obligation.

(*e*) PRADIER FODERE.

Pradier Fodere, in "Traite de Droit International Public," Vol. 1, Paris, 1885, Section 156, states:

> "The state to which cession is made is bound by *local debts* of ceded territory."

Section 157:

> "But is the state receiving the cession bound by a part of the other obligations resulting from treaties

made with the ceding state and not attached to the ceded territory, merely because it has had the benefit of the cession? In other words, are obligations and rights which are neither local nor personal, resulting from treaties made with a state, necessarily transmitted, in any proportion, to the state to which a cession is made, together with the ceded territory? *No; the ceding state remains bound or vested with the rights, for, it alone made the contract. The same rule holds, when, instead of being ceded, a province becomes an independent State.* The new state is not generally bound by *non-local obligations* of the state from which it is separated. Such at least is the principle; but it can be modified in practice by a treaty. Thus the Kingdom of Italy, after the acquisition of Lombardy and Venice, only took the place of Austria in respect of the local obligations and rights of the provinces acquired, and refused to take upon itself a proportion of the *general debt* (italics ours) of the Austrian Empire. So also no part of the French debt was imposed upon the province of Alsace-Lorraine which France was forced to cede to Germany in 1871; but—and this is an example of the exceptions which treaties can make from the general rule—the Treaty of Berlin, of 1878, imposed part of the public Turkish debt upon Bulgaria, constituting a diminished principality or territory under the suzerainty of the Sultan, and upon Montenegro and Servia, whose independence was recognized."

(*f*) BLUNTSCHLI.

Bluntschli says, Section 59:

"The debts of the state ought not to be divided proportionally to the *population*. Mortgage or landed debts will be adjudged to fall to the state which obtains the land securing the debt. Other debts will be apportioned proportionally to the *taxes* paid by the divers portions of the territory.

* * * * * *

"2. The security of other *public debts* rests on the *taxable fortune* of the members of the state, and is measured by the *actual product of the taxes* which, accordingly, furnish a *juster basis than the number of*

the population. Suppose a state to be divided in two parts, one having a rich urban population, and the other a poor rustic population. One of the parts, in case of a division proportional to the number of the inhabitants, would be overburdened with debt, and the other considerably relieved, in comparison with the taxes previously paid, all to the great prejudice of the creditors."

(*g*) BONFILS.

Manuel de Droit International Public, by Henry Bonfils. Professor of the Faculty of Law of Toulouse, 3d edition, 1901:

SECTION 223. "If a state ceases to exist by being broken up and divided into several new states, each of the latter ought to assume a portion of the debts which concerned the original state as a whole, and each of them ought also to take upon itself *exclusively the debts contracted for the exclusive benefit of its territory.*"

SECTION 224. "The new state formed by the separation of a province, or by the destruction of the bond of vassalage, should equitably assume a part of the public debt of the state of which it was a fraction. The reason of this is evident. The debts contracted by a state, in *the general interest,* have benefited all the provinces *in globo,* and the creditors had as a guaranty the wealth of all the provinces and the taxes which that wealth could bear."

SECTION 225. "Part of the territory of a state is ceded, annexed to another state. The annexing state should assume the contributive share of the annexed territory in the public debt of the ceding state. It is just that the state taking the cession should assume a part of the debts which, for divers reasons, directly or indirectly have benefited the territory with which it is enriching itself."

SECTION 226. "In the last mentioned cases, how shall the contributive share of the new state or of the annexing state be fixed? The authors are divided. Some fix upon the number of the population; others upon the extent of the territory. Bluntschli's opinion is better and juster. He determines the contributive

share according to the share of the *taxes borne by the annexed or separated province. There is, indeed, a necessary correlation between the public debt of a state and the taxes imposed upon the inhabitants.* The latter constitute a guaranty for the former.

"The personal debts of the annexed, or separated, provinces, relating to local interests, naturally ought to continue to be the debts of these provinces, and should be paid by the annexing state, or by the newly founded state."

(*h*) FRANZ V. LISZT.

Das Volkerrecht by *Dr. Franz v. Liszt*, Professor of the University of Berlin; second edition; Berlin, 1902:

Section 23, p. 175: The author, discussing the cession by a state of a part of its territory to another state, says:

"In any case, succession takes place as regards the so-called hypothecated debts (dettes hypothequees), that is, those debts which were incurred in the *exclusive interest of the ceded territory* (as for drainage works), and as regards mortgage debts (dettes hypothecaires), that is, those debts for which real property situated in the ceded territory was pledged as security."

(*i*) PIEDELIEVRE.

Precis de Droit International Public, by *R. Piedelievre*, Professor of the Law Faculty of Rennes; Paris, 1894:

Section 154:

"First question: should the annexing state take upon itself a part of the *general debt* of the dismembered state?

"The question is, in theory, at least, controverted. The negative solution is the less generally accepted. Its partisans take the ground that the dismembered state, however important a diminution of territory it suffers, nevertheless preserves its juridical personality intact, and conclude that it ought not to cease to be bound by the entirety of engagements, no more than an individual could take advantage of the loss of a part of

his patrimony so as to escape in a similar proportion the fulfillment of his obligations.

"The contrary opinion, more usually announced, seems to us better founded. It involves two principal reasons. The first is that the debts contracted by a state with a view to the *general* utility of the inhabitants, weigh *indivisibly* upon all parts of the territory, and, consequently, if one part of the territory is detached, the part of the debt which was incumbent upon it ought to follow it into the hands of its new master; the second reason is that these debts have served to realize improvements from which the annexed territory benefited in the past, and from which it may benefit again in the future; that it is, therefore, equitable that the state to which the cession is made, as it is to have the fruit of these expenses, should assume an equivalent part of their payment."

"Accepting the principle of apportionment of the debt between the two states, there is still a difficulty to resolve: how shall the principle be applied? How are we to determine what share of the debt of the dismembered state belongs to the annexed territory? Several systems have been proposed.

"Some authors consider solely the *territorial* importance of the detached provinces, so that supposing the debtor state to have lost a fourth or a fifth of its total possessions, the annexing state would have to assume a fourth or fifth of the former state's public debt. While we recognize the simplicity of this system, we think it should be rejected, for the reason that the wealth of a country has less connection with its territorial extent than with the activity of its inhabitants and the direction it has taken. With equal extent of territory, an industrial region is evidently wealthier than a purely agricultural region. But the proposed solution does not take account of this fact; it wrongly supposes the wealth of a state to be mathematically apportioned among its provinces, in proportion to their territorial extent. In practice, the result would be to give one of the states concerned an advantage at the expense of the other.

"A second system has been proposed which is sub-

ject to nearly the same criticism: this is the system of dividing the public debt between the two states in proportion to the number of the *population* of the annexed provinces. To the foregoing observations we may here add that annexation generally has the effect of creating a current of emigration, the importance of which it is difficult to foresee, and for this reason, the governments concerned would have great difficulty in finding the basis for an equitable apportionment.

"A third doctrine remains, which seems to us the best. It is that the debts should be apportioned in proportion to the figure which represents, in the whole amount of *taxes* collected by the dismembered state, the taxes paid by the ceded territory. In fact, the value of the different provinces of a state can only be measured exactly by the actual amount of the taxes paid by each of them. Besides, this system is easily applied and fully protects the rights of the creditors. The annexing state cannot complain, since before consenting to the cession it must have ascertained what were the rights and obligations of the annexed provinces with regard to the dismembered state, and the financial law which fixed the amount of taxes they were to pay sufficiently informed in respect to the debts with which it would be burdened in consequence of the annexation; on the other hand, there is no danger of the dismembered state's raising any objection in regard to the contributive share of the territory lost by it; for it fixed this share itself on the basis of the actual resources of the territory taxed.

Section 156:

"Whatever may be the solution adopted with reference to the question whether the annexing state, by reason of the annexation, ought to contribute to the payment of the public debts of the dismembered state, there are two categories of debts about which there can be no doubt:

"The first includes the *special debts* belonging to the annexed territory, that is to say, the debts which were contracted for their exclusive benefit, and which, like our department or communal debts, are not chargeable to the state. Diplomatic language calls them

dettes hypothequces, because of their particular destination. These debts the annexing state ought certainly to assume, or at least to cause them to be borne by the provinces which they specially affect. In any case, the *ceding state no longer has to pay them.* Thus by the treaties of Campo Formio of Oct. 17, 1797 (Arts. 4 & 10), and of Luneville of Feb. 9, 1801 (Art. 8), France assumed the debts hypothecated on the soil of the ceded countries which were acquired or exchanged.

"The second category includes the mortgage debts (dettes hypothecaires): these naturally are charged to the state which becomes the proprietor of the real property securing their payment."

(*j*) RIVIER.

Principes du Droit des Gens, by *Alphonse Rivier*, Professor at the University of Brussels. Paris, 1896; Volume 1, p. 213 (Art. 40, V):

"It is a general principle that ceded territory passes to the acquiring state just as it is, particularly carrying with it the obligations with which it is charged. '*Res transit cum suo onere.*'

"This principle, in the first place applies to obligations of a private nature, to the debts which specially belong to the ceded territory; the territory is transferred with its debts which remain special to it under the new sovereign as they were special to it under the old sovereign.

"This principle *should also be applied to the debts of the dismembered state* which *were contracted for the benefit of the ceded territory* and for the security of which that state gave pledges as mortgages in this territory; lastly, *the principle applied to the proportion* of the *national* debt of the dismembered state which ought to be taken over by the ceded territory.

"The authors disagree in regard to the disposition of the national debt in case of dismemberment of a part of the territory. According to some authors, the dismembered state continues to bear the whole burden. According to others, the debt is divided between the dismembered state and the annexing state, and this equitable system was put into practice in 1860 between

France and Sardinia, in 1866 between Austria, Prussia and Denmark, between the Holy See and Italy, in 1878 between Turkey and the new states, Bulgaria and Montenegro. M. Appleton, and also M. Cabonat accept the principle of division, but between the dismembered state and the ceded territory 'we favor the division of the debt between the dismembered state and the fragment detached therefrom.' *The proportion of the debt to be borne by the latter should be determined in accordance with the relative wealth of the detached portion and of the remainder of the dismembered state, and this wealth is disclosed by the taxes.*"

(*k*) FIORE.

Il Diritto Internazionale Codificato (International law codified), by *Pasquale Fiore*, Professor of International Law at the University of Naples:

Section 132:

> "In the absence of express agreement they" (the debts of the ceding state) "should be divided equitably upon the basis of the economic importance of the ceded territory, taking into account the proportional amount of the *taxes* borne by it."

Nouveau Droit International by *Pasquale Fiore*, Professor at the University of Naples; Paris, 1885.

Section 360:

> "When only a part of the territory is ceded the public debt ought to be equitably apportioned. On this subject we consider the principle laid down by Bluntschli to be correct, that the opportionment should *not be made proportionally to population*. In the case of mortgage or landed debts (foncieres), the state which receives the real property securing these debts, ought to assume their burden. Ordinary debts should be apportioned proportionally to the taxes paid by the respective parts of the territory."

(*l*) PRADIER FODERE.

P. Pradier Fodere, *Traite de Droit International Public*; volume 1; Paris, 1885.

Section 156: The author states that the state to which cession is made is bound by *local debts* of ceded territory.

Section 157:

> "But is the state receiving the cession bound by part of the other obligation resulting from treaties made with the ceding states and not attached to the ceded territory, merely because it has had the benefit of the cession? In other words, are obligations and rights, which are neither local nor personal, resulting from treaties made with a state, necessarily transmitted, in any proportion, to the state to which a cession is made, together with the ceded territory? *No. The ceding state alone remains bound or vested with rights, for it alone made the contract.* The same rule holds when, instead of being ceded, a province becomes an *independent state. The new state generally is not bound by non-local obligations of the state* from which it has separated. Such at least is the principle, but it can be modified in practice by treaty. Thus, the Kingdom of Italy, after the acquisition of Lombardy and Venice only took the place of Austria in regard to the local obligations and rights of the provinces acquired, and refused to take upon itself the payment of a portion of the *general debt* of the Austrian Empire." (Italics not the author's.) "So also no part of the French debt was imposed on the province of Alsace-Lorraine, which France was forced to cede to Germany in 1871. But—and this is an example of the exceptions which treaties can make from the general rule—the treaty of Berlin of 1878 imposed part of the public Turkish debt upon Bulgaria constituted an autonomous principality tributary under the suzerainty of the Sultan (Arts. 1 & 9), and upon Montenegro and Servia, whose independence was recognized (Arts. 26, 33, 34 & 42)."

(*m*) HUBER.

Max Huber, in his work on Staaten succession (1898) says (p. 90 § 34):

"Without reference to those numerous cases in which a sum is fixed on account of the confusion of the financial conditions and when, therefore, it is difficult to ascertain the separate proportions, we are confronted in the practice of international law with four different methods of the assumption of the debt:

"1. Territorial division (*i. e.*, Geographical).

"2. Division in proportion to population.

"3. Division in proportion to the tax return of the original domain.

"4. Division in accordance with the nationality of the creditors.

"In cases of doubt the most frequent and also the most equitable calculation of the sum to be assumed is the division in proportion to the tax return which the seceding country bears to the whole of the country."

(A reference (paragraph 226) shows that in the treaty between Prussia and Saxony, May 18, 1815, this was the basis of the division and in accordance with the agreement entered into August 28, 1819, between Prussia and Saxony, which provided for all of the details of the succession the *tax conditions* were used as a measure.)

"As in the countries of this day taxes are divided equally throughout the entire territory, the tax return of a particular portion of the country is a fairly accurate measure of its financial value to the state. Of course, the grantor always suffers a loss in favor of the grantee in so far as he loses the tax returns of the seceding country, but up to this time this has in no way been taken into consideration on account of the difficulty of the calculation.

"In confederations such as Switzerland this measure would, however, seem to be the only right way since the budgets of this country are based chiefly upon their duty returns. In such case only a division in accordance with the population would in case of necessity be permissible since the consumption of each individual

country cannot accurately be known, while at the same time it may be assumed that the imports will be in proportion to the poplation, and that the more densely populated districts are as a rule the wealthiest.

(Page 92): "The division '*pro regionis*' has no reasonable basis since a mere extent of territory bears no direct relation to the fiscal value of the country or with the political power of its government."

Section 136 (page 96). *Special Debts.*

Debts which arise out of a particular domain or which *have been incurred in the interest of a particular domain.*

"By reason of their legal nature these debts should also be considered together with those dealt with in the foregoing abstract (*i. e.*, debts borne by the entire state or country). The debtor is the entire country. The liquidation will arise out of the debts of the entire country. Only the purpose is a different one. Such debts arise either in the interest of a particular portion of a country or they may be assumed by the main government as an already existing debt of a particular portion of it, in which latter event, of course, this would relieve such smaller or particular portion. In this respect these are the debts of the main government in the interest of a particular portion of it.

"According to the European practice these debts are always assumed by the seceding state; that is the seceding state has the obligation to assume them."

Section 272:

"Certainly the territorial principle applies to debts which have reference to particular portions of the country. Regarding these, the owner of the particular portion interested incurs the indebtedness. We have designated these debts as 'special capital' and they should always follow the fate of their territorial foundation."

(*n*) APPLETON.

Henri Appleton makes the following statement in his book entitled: "Des Effets des Annexions de Territoires Sur Les Dettes de L'Etat

Demembre ou Annexe," etc., *Paris 1895*, Chapter IV., Section II., Section 65:

"As soon as the principle is admitted that the debt of a dismembered country should be divided between it and the state which takes one or more of its provinces, a new question arises. In what proportion shall the division be made? Very evidently the more important the annexation, the greater will be the contributory part to be charged to the annexing state. If a tenth of the dismembered country is taken, the annexing state will pay a tenth of its debt. If a fourth is taken, it will assume a fourth of the debt.

"But we must be precise. When a fourth, a tenth of the dismembered country is mentioned, is the reference to the extent of its territory, to the number of its population, or to its wealth?

"What criterion shall we take, what basis must be adopted for such an apportionment?

"On this point opinions have not always been in harmony. The practice has varied, and the authors themselves have not always agreed. We do not speak, to be sure, of authors like Hall, Dudley Field, etc., who leave the entire burden of its debts upon the dismembered state. For then the question cannot arise, and none of them treats it, because they reject the principle itself of apportionment. The problem exists only if one admits apportionment of debt in principle, whether from the point of view of payment, as we have treated the matter, or from the double point of view of collection and payment, as is generally done.

"Three systems of apportionment: on the basis of extent of territory, on the basis of population and on the basis of wealth, have been recommended and applied. In 1866 Italy took upon herself the papal debt in proportion to the population of the provinces of Roumania which she had conquered.

"The treaty of Berlin left the question in doubt. Bulgaria, Montenegro and Servia, which took important territories from Turkey, were required in consequence of this to assume a part of the Turkish debt 'calculated upon an equitable basis.'

SECTION 66. "But at the present time one may say that the two first systems have had their day. The third system receives support

from the unanimous opinion of the publicists and in practice. It seems to be the most just, and, in truth, the only really equitable system. Indeed, the extent of territory acquired by the annexing state cannot be taken as a criterion; if the conquered territory is that of a great city, the conquest is infinitely more valuable than if it consisted of mountains or desert regions. The city has infinitely greater resources and furnishes more taxes, which enable the conqueror to assume a heavier part of the debt. As M. Cabouat says very well: 'With equal area, an industrial region is superior to a purely agricultural region, and even between territories of equal extent, devoted either to agriculture or to industry, it would be rash to affirm a constant equilibrium. Now, the system we are combating, completely ignores these facts; it reasons as if the wealth of a state could be mathematically divided among each of its provinces in proportion to their respective extents. Such a system could not be followed except upon the altogether chimerical hypothesis of dealing with the debt of an exclusively agricultural or manufacturing state whose various parts should have attained an equal degree of development. In practice the clearest result of such a system would be to procure for one of the interested states a reduction of the obligations incumbent upon it, and, consequently a gain, wholly at the expense of the other state.'

"An apportionment of the debt according to the number of the population inhabiting the annexed provinces would be subject to the same criticism. The new population acquired by the annexing state may be poor and capable of paying only small taxes; it may be, on the contrary, rich and prosperous. It would be unjust, in the two cases, to charge the annexing state with the same part of the debt. On the other hand, annexation always starts a current of emigration more or less strong. The population which the annexing state gains by annexation is always more or less inferior in number to that of the province at the moment of the annexation. This diminution, this decrease, cannot be foreseen, with any precision, at the moment of the treaty, and the apportionment which the negotiators might wish to make, would lack a solid basis."

* * * * * * *

§ 67. "The conclusion drawn by the authors from these observations is that a single criterion is admissible: that of wealth. Wealth will be disclosed by the amount of taxes paid up to the annexation by the two portions of the dismembered state: the annexed portion and the portion which keeps its independence. To eliminate as much as possible causes of error, the taxes taken are not those paid during the year preceding the annexation, but an average calculated over a space of several years. If the ceded province supplied a tenth, a fourth of the taxes levied by the ceding state, that state will be discharged of a tenth, a fourth of its debt. We are bound, like everybody else, to approve of this criterion. It is plain justice to take as a basis of apportionment, wealth as disclosed by taxation."

3. APPLICATION OF INTERNATIONAL LAW DOCTRINE IN THIS CASE

Quotations from publicists have been indulged with much liberality in the hope that they may be found convenient to the members of the Court, also for the purpose of showing the unanimity with which they recognize the distinction, in respect of debt succession among nations, between a *general* or *national debt* and a *special* or *local debt*, and the consequences resulting from the distinction; and for the further reason that they supply the international law standard for debt apportionment, which counsel have assumed to be either area, population or taxable values, and that they agree that the latter is the just and adopted standard.

Even if the Court should be of opinion that the rule of international law does not govern the present case, yet if the Court, apart from the method prescribed by the ordinance and notwithstanding the provision in the Constitution of West Virginia referring the matter for ascertainment to the legislature of that state, should undertake to determine the equitable proportion of the old Virginia debt which West Virginia should assume, then we submit that the Court cannot fail to give great weight to the authorities on international law which we have cited. The rules of international law are based entirely upon consideration of equity and fairness. They have no force nor sanction except from the consent of nations by reason of their evident justice. This Court, therefore, in determining what would be an

equitable apportionment of the Virginia debt, would undoubtedly desire to take into most careful consideration the unanimous opinion of the modern international law authorities that, in apportioning the debt of a state after its division, equity requires a distinction to be made between the portion of the debt which is local or special in its character and that which is general, so that the parent state and the new state are bound respectively to assume the whole of the *local debt* relating to their respective territories, leaving only the *general debt* to be apportioned on the basis of taxable value.

4. RECOGNITION OF DISTINCTION BETWEEN GENERAL AND LOCAL DEBTS IN DIVISION OF TERRITORY OF DAKOTA.

The authority for the rule of international law in the present case is peculiarly confirmed and strengthened by the fact that it was adopted and applied in the only case in our history which is directly analogous to the present case. We refer to the division of the territory of Dakota into the two states of North Dakota and South Dakota. The territory of Dakota had a bonded indebtedness incurred for the purpose of erecting certain public buildings and institutions. It also had incurred certain other liabilities of a general character.

The Sixth Section of the Act of Congress providing for the devision of Dakota into two states (25 U. S. Stat. at Large, p. 676) required the constitutional conventions of North Dakota and South Dakota to appoint a joint commission, whose duty should be to agree upon an equitable division of all property belonging to the territory of Dakota and to adjust and agree upon the amounts of the debts and liabilities of the territory which should be assumed and paid by each of the proposed states of North Dakota and South Dakota. The Act of Congress further required the agreement respecting the territorial debts and liabilities to be incorporated in the respective constitutions of the new states, and required each of them to obligate itself to pay its proportion of such debts and liabilities, the same as if they had been created by such states respectively.

A joint commission was duly appointed and made an agreement for the two new states respecting the territorial debts and liabilities, which agreement, in accordance with the enabling Act of Congress,

was incorporated in the constitutions of North Dakota and South Dakota. The provisions concerning the apportionment of the territorial debt which we shall quote, are taken from the Constitution of South Dakota. (Similar provisions will be found in Art. 16 of the Constitution of North Dakota.)

Section 6 of Article 13 of the constitution of South Dakota is as follows:

> "In order that the payment of the debts and liabilities contracted or incurred by or in behalf of the Territory of Dakota may be justly and equitably provided for and made, and in pursuance of the requirements of an Act of Congress approved Feb. 22, 1889, entitled 'An Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states,' the states of North Dakota and South Dakota, by proceedings of a joint commission duly appointed under said Act, the sessions whereof were held in Bismarck in said State of North Dakota, from July 16, 1889, to July 31, 1889, inclusive, have agreed to the following adjustment of the amounts of the debts and liabilities of the Territory of Dakota which shall be assumed and paid by each of the States of North Dakota and South Dakota, respectively, to wit:"

The agreement follows.

Paragraph 3 of the agreement provides:

> "The said State of North Dakota shall assume and pay all bonds issued by the Territory of Dakota to provide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of North Dakota, and shall pay all warrants issued under and by virtue of that certain act of the legislative assembly of the Territory of Dakota, approved March 3, 1889, entitled 'An Act to provide for the refunding of outstanding warrants drawn on the capitol building fund.'"

Paragraph 4 provides as follows:

> "The said State of South Dakota shall assume and pay all bonds issued by the Territory of Dakota to provide funds for the purchase, construction, repairs or maintenance of such public institutions, grounds or buildings as are located within the boundaries of South Dakota."

Paragraphs 5 and 6 specify the particular bonds to be assumed respectively by North Dakota and South Dakota, and specify the local situations of the buildings and institutions on account of which the bonds assumed by the two states were issued.

Paragraph 6 provides:

> "The States of North Dakota and South Dakota shall pay one-half each of all liabilities now existing or hereafter and prior to the taking effect of this agreement incurred, except those heretofore and hereafter incurred on account of public institutions, grounds or buildings, except as otherwise herein specifically provided."

Paragraph 7 provides in part:

> "Nor shall either state be called upon to pay or answer to any portion of liability hereafter arising or accruing on account of transactions heretofore had, which liability would be a liability of the Territory of Dakota had such territory remained in existence, and which liability shall grow out of matters connected with any public institution, grounds or buildings of the territory situated or located within the boundaries of the other state."

Paragraph 8 provides in part:

> "A final adjustment of accounts shall be made upon the following basis: North Dakota shall be charged with all sums paid on account of public institutions, grounds or buildings located within its boundaries on account of the current appropriations since March 8, 1889; and South Dakota shall be charged with all sums paid on account of public institutions, grounds or buildings located within boundaries on the same accounts and during the same time. Each state shall be charged

with one-half of all other expenses of the territorial government during the same time."

The Court will observe that the apportionment of the debt of the Territory of Dakota between the new States of North Dakota and South Dakota under their agreement was absolutely in accordance with the rule of international law that when a state is divided *local debts* must be assumed in their entirely by the state taking the territory with reference to which such debts were incurred. Each of the States of North Dakota and South Dakota assumed the bonds which had been issued on account of institutions located within its boundaries. General liabilities, on the other hand, were apportioned equally between the two states, as appears in paragraphs 6 and 8 of the agreement quoted above.

No contention can be made that this was merely the case of a special agreement, from which no principle of general application can be derived. The constitutions of the two states expressly declare the result of their agreement to be just and equitable. Section 6 of Article 13 of the South Dakota constitution (a similar provision will be found in paragraph 3, section 203, article 16 of the North Dakota Constitution) declares:

"In order that the payment of the debts and liabilities contracted or incurred by and in behalf of the Territory of Dakota may be *justly and equitably* provided for and made * * * the states of North Dakota and South Dakota * * * have agreed to the following adjustment of the amounts of the debts and liabilities of the Territory of Dakota," etc.

Hence the opportionment of the debt of the Territory of Dokata can only be regarded as an equitable settlement between the two states. The full recognition in this settlement of the distinction between *local* and *general debts* not only confirms the doctrine of international law on this subject, but must impress the Court as an unique and valuable precedent for the purposes of the present case.

5. DISTINCTION BETWEEN GENERAL AND SPECIAL DEBT DISCUSSED IN NEGOTIATION OF TREATY BETWEEN UNITED STATES AND SPAIN.

His Honor Mr. Justice Day will remember that the distinction between a *general* or national debt and a *special* or *local debt*, from the standpoint of international law, involved a prolonged discussion between the American and Spanish commissioners at Paris in negotiating the Treaty of Paris, under which the United States secured to Cuba her independence and brought under our sovereignty Porto Rico and the Philippines. The Spanish Commissioners contended that the United States should assume, either for herself or for Cuba, that portion of the indebtedness which had been incurred and for which Spain had issued obligations *primarily secured by an hypothecation of the revenues of Cuba.* They contended that it was, to all intents and purposes, a Cuban debt; in other words, *local or special*, as contradistinguished from the *general or national* debt of Spain. The American commissioners recognized the distinction, but refused to accede to the demand of Spain, upon the ground that Cuba had had no debt, but, on the contrary had been a self-supporting colony, and that the indebtedness was incurred, and its proceeds used to wage war upon Cuba, and to resist by arms the aspirations and struggles of her people to be freed from long-continued despotism and misrule and was a part of Spain's *national or general debt.*

If we had taken over Cuba in the absence of *strife between Cuba and Spain and the United States and Spain*, and *there had been found an indebtedness incurred by Spain*, the *proceeds of which had been expended in public improvements in Cuba and for the benefit and betterment of the island and its inhabitants*, the question would have been a different one, and from the standpoint of international law and justice, our attitude must have been different.

6. THE DISTINCTION BETWEEN GENERAL DEBT AND LOCAL DEBT IS SUBSTANTIAL AND JUST.

And this distinction between a *general* and a *special* or *local debt* is a substantial one. It rests upon a sound principle, and is essentially

just. Obviously, there is no such distinction when we consider the relation of a state and its creditors. There, the purpose for which the loan was effected is immaterial: but, in respect of the apportionment of the debt of a state between itself and a new state, erected out of its territory, the distinction is not only apparent but important.

A *general debt*, using the phrase as the publicists use it, with reference to debt succession, one would say is a debt, the object and result of which inures to the benefit of all the people subject to the dominion of the state, the expenditures of which are not susceptible of localization, and which cannot be said to benefit one section more than another, or one class of citizens more than another.

The debt incurred by the United States during the war in maintaining the Union would fall, from every standpoint, within the definition of a *general debt*. It was to preserve the Union as the fathers made it, and its benefits inured to all the people in all the states.

If the Southern Confederacy had become an established government, a nation, the indebtedness which it had incurred in the establishment of that government would have been a *national* or *general debt* as contradistinguished from a *special* or *local debt*.

This expenditure of its proceeds would have been made for the general and indivisible benefit of the people living under its sovereignty.

Such a debt is not, in its nature, apportionable except by special agreement, or, ratably upon some basis recognized by international law.

On the other hand, the *special* or *local debt*, however large it may be, incurred by a state or a nation, upon a division which results in the erection of a part of the national territory into another nation or state, *apportions itself*.

If it had happened that every dollar of the public debt of the Commonwealth of Virginia, prior to January 1, 1861, had been expended in the construction of railways which Virginia owned, and canals and public buildings, toll highways, improved navigation, the utilization of which by the public required the payment of tolls, all owned by Virginia and within her borders, after the separation, could it, with any justice, be said that West Virginia, upon the division of the

two states and the erection of West Virginia into a state, should in equity assume any portion of that burden, when not a dollar of the money had been expended within her territory, and if there were not within it a work of internal improvement erected by Virginia out of the proceeds of that debt? Such improvements are on the land, and, of necessity, are transferred with it.

Suppose, on January 1, 1861, the only debt resting upon the Commonwealth of Virginia had been a debt of $10,000,000, the proceeds of which had all been *directly expended within the limits of the present State of West Virginia, and thereupon for the benefit of its people*, in the construction of railways and public buildings, in the making of highways and other improvements, important in their character and beneficial to that people remote from tide-water, and West Virginia had been admitted as a state into the Union, with no provision as to apportionment of debt. Can there be any doubt, upon principles of international law, and upon principles of common justice that it would *have been the duty of the new state to take that entire debt upon her shoulders?* It would have been incurred with reference to her territory. It would have been expended within her limits, and for her benefit. Although such a debt, like any other, as between Virginia and her creditors, would have bound Virginia, yet, as between Virginia and West Virginia, it would have been a special debt which West Virginia ought to assume and pay. If this proposition is not sustained by all writers on international law who have touched the subject, we are mistaken. What answer could West Virginia have made to it? Between nations, a refusal to adjust it upon that basis might very well have resulted in war.

7. THE PUBLIC DEBT OF VIRGINIA PRIOR TO JANUARY 1, 1861, WAS A LOCAL OR SPECIAL AND NOT A GENERAL DEBT.

It is averred in the first paragraph of the bill, that:

> "On the first day of January, 1861, your oratrix was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory."

It is admitted, in the first paragraph of the answer:

> "That she believes it is true as alleged that on the first day of January, 1861, plaintiff was indebted in 'about' the sum of $33,000,000, upon obligations and contracts made in connection with the construction of works of internal improvement within her then territory."

The investigation before the Master, as shown by the exhibits, clearly makes it appear that Virginia had no *general* public *debt* in 1823, and that the $33,000,000 was expended in works of internal improvement.

Here we are logically led to an analysis of this debt and of the purposes for which it was incurred and the expenditure of its proceeds.

8. THE NATURE OF THE DEBT, AS SHOWN BY THE LEGISLATION UNDER WHICH IT WAS INCURRED.

Let it be said first, that Virginia, in 1823, the initial year of the period ending with December 31, 1861, during which the debt of the commonwealth here involved was created, appears to have had outstanding no general debt.

Virginia embarked early on a system of internal improvement. She passed, on February 5, 1816:

> "An act to create a fund for internal improvement, to be applied exclusively to the purpose of rendering navigable and uniting by canals the principal rivers, and of more intimately connecting, by public highways, the different parts of this commonwealth."

This fund consisted of the shares held by the commonwealth in the stock of the following companies; Little River Turnpike Company, Dismal Swamp, Appomattox, Potomac and James River Canal Companies, of the Bank of Virginia and also the Farmers' Bank of Virginia,

> "together with such dividends as may from time to time accrue to such shares of stock, and such bonds and premiums as may be hereafter received for the incorporation of new banks or the augmentation of the capitals or the extension of the charters of existing banks."

She, at the same time, provided that, for the purpose:

> "of preserving and improving this fund, and of disbursing such portions of it as the General Assembly may, from time to time, direct, to be applied to any object of internal improvement, it shall be, and the same is, hereby, vested in a corporate body to be styled 'the president and directors of the Board of Public Works,' in which name they shall have a common seal, etc."

The governor was made, *ex officio*, the president of the board of public works. The directors were to consist of the treasurer and attorney general of the commonwealth, for the time being, and of ten citizens thereof, three of whom were to reside westward of the Alleghany Mountains, two between the Alleghany and the Blue Ridge, two between the Alleghany and the Great Post Road, and the residue between that road and the sea coast.

The act provided that the fund should be deposited in the Treasury, subject to the order of the president and directors of the board, paid out or delivered by the treasurer of the commonwealth upon the order of the board, and required accounts of the disbursements and the certificates upon which the same shall have been made to be preserved, and an annual account to be rendered to the general assembly.

Section 11 provided that the president and directors of the board of public works shall be, and they are hereby, authorized to subscribe, in behalf of the commonwealth, to such public works as the general assembly may, from time to time, agree to patronize, such portions of the fund for internal improvement as may be directed by law; but that no part of the said fund shall be subscribed towards the stock of any canal, turnpike or other company until three-fifths at least of the whole stock necessary to complete such canal, turnpike or other public works of such company, *shall have been otherwise subscribed*; or until, of the stock so subscribed, one-fifth thereof shall have been actually paid by the resident subscribers, or the payment thereof effectually secured by bond of approved security, or a deed of trust upon the real estate of such subscriber, of twice the value of such one-

fifth part; such bond to be taken payable to the president and directors of the company authorized to complete such public work.

It was then provided that the dividends on the stock subscribed by the president and directors of the board of public works should go exclusively to other subscribers than the commonwealth until such portion of the stock of those subscribers shall have netted to them six per centum per annum from the specified time of such payment: that any increase of profit after that net income should have been assured to the subscribers, should belong exclusively to the fund for internal improvements, until the net annual income of the whole stock actually expended by any company shall reach six per centum per annum;

> "*after which the commonwealth and the other subscribers to the stock* of the company shall divide the net profits on such stock in proportion to their respective interests."

It then provided that the president and directors should vest in some productive fund the undivided dividends accruing upon any of the stock, until the same was specially appropriated by law to some internal improvement; and adds:

> "And shall have power, subject to the control of the general assembly, to sell, from time to time, as may be ordained by law, the whole or any part of the shares held by the commonwealth of the stock of any canal, turnpike or other company subscribed for under the provisions of this act, *for the purpose of investing the proceeds of such sale in the stock of some other similar company*, subject to the like conditions as have been before expressed in this act."

The board of public works were given power, in behalf of the commonwealth, to appoint such number of directors of every public work as shall bear to the whole number of directors of such work the proportion of the commonwealth's shares of stock in such work, which may be subscribed in pursuance of this act to the whole number of shares thereof.

Section 16 provided:

> "That the public faith shall be, and the same is, hereby, solemnly pledged to fulfill the obligation of this act, and that the said appropriation shall continue in force until the first day of January of the year one thousand eight hundred and sixty-six; except at such time as the United States of America may be involved in war, or the safety of this commonwealth, may, in the opinion of the general assembly, require, when the general assembly may, withdraw (during the period of actual hostilities or of such imminent danger) the whole or any part of such fund, for the purpose of defense, provided such withdrawal can be made without a violation of any engagement made under this act."

The provision above quoted, by which the state withheld herself from dividends until the citizen subscribers had netted six per cent on what they had paid in, was changed by an act of February 20, 1829, chapter 21, in which it was enacted:

> "And all dividends upon subscriptions hereafter authorized or required to be made by the general assembly to any canal, road, bridge company or other corporation, shall be made and stand upon the same footing with subscriptions made by individuals."

The legislature of the commonwealth passed February 7, 1817, chapter 38, a general act providing certain general regulations for the incorporation of turnpike companies, entitled:

> "An act prescribing certain general regulations for incorporation of turnpike companies."

This act provided that:

> "Whenever it may be deemed expedient for the general assembly to make a turnpike road, and an act shall actually pass the general assembly for such purpose, the following general provisions shall be deemed to be contained as part of the said charter or act of incorporation, as if the same had been actually re-enacted in reference to such grant or charter, except in so far as such grant, charter or act may expressly provide."

And then provides that:

> "The commissioners named in any special act, or a majority of them, shall have power to open books for subscriptions to the stock at the places named in the act, and to divide the capital stock into as many shares, not exceeding one hundred dollars each, in amount, as they may deem proper, to appoint any number of deputy commissioners, to open books of subscription to the stock of the company, and the subscriptions shall be made and the payment of moneys received on subscriptions to the president and directors by the commissioners; that the books shall remain open until at least one-half of the capital stock of the company shall have been subscribed, when a general meeting of the subscribers is to be called by the commissioners,"

and provided other details for the purpose of organization.

It also prescribes the tolls which may be exacted, and provides for changing them, either raising or lowering the amounts, upon certain contingencies.

By section 28, it is provided that:

> "If the said president and directors do not begin the said work within two years after the passage of the act for *incorporating* the company, or shall not complete the same within ten years thereafter, in the manner hereinbefore directed, then the interest of such company in the said tolls and roads aforesaid shall be forfeited and cease."

It provides for reports of the receipts and profits to the board of public works.

It also provides that:

> "If the commonwealth shall desire to purchase the stock of such company, and shall vest authority to make such purchase in any person, corporation or body politic, it shall not be lawful for the *proprietor* of any such stock to sell or transfer the same to any person whatever until he shall actually and with good faith have offered the same for sale, for the price for which he is

> willing to take therefor, to the person, body politic or corporation, authorized to purchase by the commonwealth."

And also provides that after such offer to such person, body politic or corporation, no transfer or assignment to any other person, shall be entered or registered in the books of such company, or vest any right whatever, unless it shall have been proven to the satisfaction of the president and directors that the stock so transferred had been, with good faith, previously offered to the person, body politic or corporation, so authorized, at a price at least as low as that at which it had been sold to such assignee or transferee.

A general act was passed February 11, 1832, prescribing certain general conditions on which subscriptions to certain joint stock companies shall be made on behalf of the commonwealth. This act provides as follows:

> "That all subscriptions which are now authorized by law and have not been made by the board of public works, or which may hereafter be authorized, shall be subject to the following conditions and provisions, to wit:
>
> "In every case the board of public works shall be furnished with a certificate under the seal of the company signed by the treasurer and countersigned by their president, stating that at least one-fourth of the private subscriptions of not less than three-fifths of the capital stock has been actually paid up into the hands of such treasurer, and the remainder of such subscription is either so made or is made by solvent persons fully able to pay, and these facts be shown to the satisfaction of the board of public works. They shall also be furnished with a list of the stockholders, showing a list of the shares standing in each name."

(The provision with reference to the proportion of capital stock subscribed by individuals was afterwards changed to "two-fifths," so that the state took three-fifths and private stockholders were permitted to take only two-fifths.)

If any private improvement shall have been commenced previously, and the subscriptions thereto have been authorized or made, the

board of public works shall be furnished with a statement showing the amount of money received up to the date of such statement, and of the amount expended in the work, together with the balance of money on hand, the contracts entered into for the construction of the improvements, the exact progress made therein, as near as may be, its dimensions and a correct map of its location.

The section provided:

> "Installments of future subscription of the board of public works shall be applied in the manner and on the conditions hereinbefore mentioned when not otherwise specifically provided by law; that is, one-fourth of such subscription shall be paid on the production of the draft of the treasurer or other authorized agent of the company, in the manner and in such form as the board of public works may prescribe, and the remaining three-fourths on similar drafts, in six equal semi-annual installments or in installments *of the same proportions with future payments or private subscriptions at the discretion of the board of public works.*"

It also provided that:

> "Before payments of the installments aforesaid, the board of public works shall be furnished in every case with a certificate in the form and manner required by the first section of this act, showing the amount actually paid up by the private stockholders, which amount must be at least equal to the amount payable by the board of public works."

It was the evident purpose of the commonwealth from the beginning to render susceptible of easy ascertainment the identification of each loan with the particular improvement for which it was authorized by special act of the legislature to be made. Thus, by chapter 117 of the laws of 1834, which authorized the borrowing of money on the credit of the state at a rate of interest not exceeding five per centum for sums of money not less than $30,000, and not exceeding $60,000, it is provided:

> "That the moneys so to be borrowed shall be paid into the treasury upon the warrant of the second auditor, and upon the receipt in the treasury of the sum

or sums so borrowed, the treasurer shall issue his certificate of loan for the amount thereof, purporting that the Commonwealth of Virginia owes to the lender, his heirs, executors, administrators or assigns, the principal sum so borrowed, together with the interest at the rate of interest agreed upon, and that the interest so agreed upon is payable semi-annually at the treasury of the commonwealth. *Such certificate shall show on the face thereof that the loan was made under authority of this act.*"

And this principle was embodied, as the Court will see, in chapter 12, laws of 1838, providing for the negotiation of loans for internal improvements, a general act, the pertinent portions of which are as follows:

"First, that all loans hereafter authorized by law for the payment of subscriptions on behalf of the commonwealth to the capital of joint stock companies *incorporated* for purposes of internal improvement or for defraying the expense of any work or internal improvement in which the state is or may be interested, as well as all loans heretofore authorized, shall be negotiated according to the provisions of this act, except so far as may be otherwise specially provided by the acts authorizing the loans.

"Second, the board of public works in effecting such loans shall borrow upon the credit of the commonwealth at the lowest rate of interest at which the necessary amount can be obtained, not exceeding in any case five per centum per annum. Upon the payment of the moneys so borrowed into the treasury, which shall be done upon the warrant of the second auditor, the treasurer shall issue a certificate or certificates of loan for the amount thereof purporting that the Commonwealth of Virginia owes to the lender, his heirs, executors, administrators or assigns, the principal sum so borrowed, together with the interest at the rate agreed on; and that the interest is payable semi-annually at the treasury of the commonwealth, *and that such certificate or certificates were issued under authority of a special act authorizing such loans;* which certificate shall be signed by the treasurer and countersigned by

the second auditor and be registered in a book to be kept for that purpose by the second auditor, and shall be transferable on the books of his office in person or by attorney." * * * "All loans negotiated in conformity with this act shall be irredeemable for twenty years and shall afterwards be redeemed at the pleasure of the general commonwealth.

"Third, for the payment of the interest and the final redemption of the principal of any sum to be borrowed in conformity to this act, the stock of any joint stock company subscribed for or purchased with the moneys so borrowed, together with the dividends and other net incomes which may accrue therefrom to the commonwealth or to the fund for internal improvement, shall be and the same are *hereby appropriated and pledged; and in like manner the net income and other profits which may accrue from works in which the state is interested other than those of joint stock companies, and on which the money borrowed is to be expended,* shall be and the same are likewise hereby *appropriated and pledged for the payment of the interest and redemption of the principal of the moneys so borrowed;* that if the stock aforesaid and the said dividends, net profits and other income shall be inadequate to the payment of the said semi-annual interest and the final redemption of the principal of the respective loans, the general assembly pledges itself to provide other and sufficient funds, and for that purpose to levy any necessary and adequate taxes upon any or all subjects liable to taxation under the Constitution."

The act provides that:

"If the dividends and income arising from the stock or work as aforesaid, together with the fund for internal improvement, shall be insufficient to pay all interest due upon the loan when demanded, the auditor of public accounts shall, upon the application of the board of public works, issue his warrant upon the treasury directing the payment of such interest out of any moneys therein not otherwise appropriated, and in case of the inability of the treasury at any time to discharge such warrants, the board of public works shall be and they are hereby authorized to borrow the necessary amount from

> the banks of this state at a rate of interest not exceeding six per centum per annum, on the credit of the commonwealth, to be repaid in such manner as the general assembly may by law direct."

By section 5 the board is authorized and empowered to procure any or all of the loans authorized by law, either in the United States or in Europe, as they may deem most advantageous to the public interest, and for that purpose to appoint one or more agents with necessary powers, and to allow him or them such compensation as they may deem reasonable; also that as to European loans they may provide for the payment of interest on the same semi-annually in London or elsewhere, and may stipulate for the payment by the lenders of the amount of such loans in England or elsewhere, conforming the certificates to be issued to the terms of the loans.

It appears in the case that during the debt period, between 1823 and 1861, a large number of stock corporations were created to build works of internal improvement, of one kind and another, to whose stocks the board of public works, under this legislation, subscribed on behalf of the commonwealth, for a time, for two-fifths, and for another time, for three-fifths, but never until, in the one case three-fifths, and in the other, two-fifths, had been subscribed by *solvent private citizens,* and a required sum paid in *on the private subscriptions.* Moneys were borrowed in sums, great and small, from time to time, to pay these stock subscriptions of the commonwealth. This applied to turnpike companies, bridge companies, navigation companies and railway companies. And the state also subscribed a large amount to the stock of banks incorporated by her legislation and issued bonds in payment of her subscription.

The record shows that Virginia expended about $4,0000,000 more than the $33,000,000 debt on works of internal improvement, out of moneys raised by taxation. In some instances she expended through her board of public works directly the proceeds of loans.

In respect of all of the debt, the proceeds of which were expended in West Virginia, the schedule shows that the loans which she effected were numbered as required by law, the certificate of debt or certificates of debt, referring to the act which *authorized the particular expenditure,* so that it is not only true that the debt represents expenditures

for internal improvements, but it is true, so far as the expenditures in West Virginia were concerned, that the moneys which were expended, the proceeds of loans, are traceable to the particular improvements and the stocks and dividends thereon were pledged for the repayment of the loan.

An examination of complainant's exhibit A-2, which shows the form of bonds, will disclose that each loan was numbered; so that while the aggregate amount of the debt is very large, it is composed of a vast number of separate, relatively small loans, each susceptible of identification, and the proceeds of each traceable to the particular improvement for which the loan was authorized to be made, so that each loan was localized.

By chapter 8, laws, passed March 27, 1839, page 9, it was provided:

> "It shall be lawful for the treasurer of the commonwealth, and he is hereby directed upon the requisition of the board of public works, *and without requiring the previous payment of money into the treasury on account thereof, to issue* certificates of stock for the amount of any loan or loans which are now or may hereafter be authorized by law, to procure for private or internal improvements, payable in currency of the United States or that of any European state, and in such form and with such conditions and stipulations, *not inconsistent with law*, as the said board shall direct, which certificate shall be countersigned," etc., etc.

This phrase "not inconsistent with law" preserved the identification of the loan with the particular improvement as provided by the act of 1838 above quoted.

As it was a general provision of law, the presumption is that the same thing is true of the loans, the proceeds of which were expended within Virginia, or in the purchase of stocks of corporations whose improvements were within her present limits.

The Rule of Public Law Does Not Govern This Case Because the Wheeling Ordinance and the Constitution of West Virginia Constitute a Special Agreement as to the Proportion of the Old Virginia Debt to be Assumed by West Virginia.

Even if the Court should not recognize the distinction between *general* and *local debts*, the present case is within the exception to the rule of international law as stated by Mr. Justice Field in that the matter of the division of the public debt was the subject of a special agreement between the two states evidenced by the 9th section of the Wheeling Ordinance and Section 8 of Article VIII. of the Constitution of West Virginia.

1. SECTION 9 OF THE ORDINANCE.

The pertinent portion of the ordinance is as follows:

> "9. The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period. All private rights and interests, in lands within the proposed state, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the State of Virginia.
>
> "The lands within the proposed state of non-resident proprietors shall not, in any case, be taxed higher than the lands of residents therein. No grants of lands, or land warrants issued by the proposed state shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed state now liable thereto."

2. SECTION 8 OF ARTICLE VIII. OF WEST VIRGINIA CONSTITUTION.

Section 8 of Article VIII. of the Constitution, "Taxation and Finance," is as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January in the year one thousand eight hundred and sixty-one shall be assumed by this state; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

3. TWO VIEWS OF OPPOSING COUNSEL IN RELATION TO THE ORDINANCE.

Two views are taken in relation to the ordinance and the quoted provision of the constitution by opposing counsel. The learned counsel who represents the "bondholding creditors of Virginia" contends in his brief (p. 38):

> "That ordinance, as shown by its title, was to provide for the formation of the new state. All of its sections, except the ninth, were directed toward that end. The state was formed when its constitution was framed and adopted by the people. The ordinance then became *functus officio*, and ceased to have any operation."

It is hardly to be expected that a lawyer, in the changing fortunes of a great litigation, can always be entirely consistent. The learned counsel has stated that he drew the bill, by the filing of which this suit was inaugurated. In that bill, page 4 (May's Comp.), is set forth the ordinance, followed on page 6 by several quotations from the first Constitution of West Virginia, including section 8 of Article VIII.

Paragraph 18 of the bill is as follows (p. 10):

> "Your oratrix charges that the liability of the State of West Virginia for a just and equitable proportion of the public debt of Virginia as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:
>
> "*First.* The area of the territory now known as the

State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this *public debt* was created, and its population included about one-third of that of the original state at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the *public debt* created prior to the partition of such territory.

"*Second.* The *liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia as it existed prior to the creation and erection of the State of West Virginia forms part of her very political existence, and is an essential constituent of her fundamental law*, as *shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861 in which the method of ascertaining her liability on account of said debt is prescribed. And this liabilty is imbedded in the Constitution under which she was admitted as a state into the Federal Union*, and *was one of the conditions under which she was created a state and admitted into the Union.*"

The learned counsel for the bond-holding creditors says, in his brief (page 37):

"The tenth section of the ordinance to provide for the erection of a new state," etc. provided that—"When the general assembly shall give its consent to the formation of the new state, it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the new state may be admitted into the union of states."

He adds:

"It did not provide that a copy of the 'ordinance' should be forwarded to congress, and there is nothing in this entire record to sustain the assertion that congress ever saw or knew of that ordinance or of its provisions."

It may be true that there is nothing in the record, technically speaking, to evidence the fact that the ordinance was before the congress, and accessible to its members, at the time the bill for the

admission of West Virginia was being considered and passed. That depends upon what the record in this case is; but some things the Court will take judicial notice of. In many instances, it has taken judicial notice of the archives of the government and the legislative history of measures before it, the construction and effect of which have been here involved. It has taken judicial notice of records of the treasury department, of the records of the congress in respect of the history of measures, or amendments offered and adopted or rejected, and of reports of committees.

It is said in our brief, filed on the argument of complainant's motion to refer cause to Master (page 42) as follows:

> "It ought here to be stated that the constitutional convention of West Virginia appointed three commissioners to that end, also that the commissioners presented on May 31, 1862, to the United States Senate a memorial praying for the admission of that state into the Union, addressed to the Honorable B. F. Wade, chairman of the committee on territories, in which they gave a history of the proceedings which led to the organization of the restored government of Virginia, *and which included at length the ordinance adopted on the 20th of August, 1861, by the convention at Wheeling, entitled, 'an ordinance to provide for the formation of a new state out of a portion of the territory of this state,' which, on the 31st day of May, 1862, was referred by the senate to the committee on territories and ordered to be printed* (Congressional Globe, p. 2451; 37 Cong. 2d. session, Misc. Senate Doc., No. 99)."

The Congressional Globe, being a public document, giving the proceedings of co-ordinate branches of the government, this Court will, undoubtedly, under the authorities, take judicial notice of the fact that it was presented to the senate, that it was ordered by the senate and referred to the committee on Territories. That the order to print the usual number, which supplies both houses, was obeyed, the Court will presume.

The Paquette Habana, 175 U. S., 712.
United States v. *Whittridge*, 197 U. S. 135.

4. VIRGINIA IS NOT IN A POSITION TO INSIST UPON THE ELIMINATION OF THE ORDINANCE FROM THE CASE.

Neither the learned counsel, nor the Commonwealth of Virginia, is in position to insist upon the elimination of the Wheeling Ordinance from this case. In 1871, *years after the adoption of the Wheeling Ordinance* and the *Constitution of West Virginia*, the Commonwealth of Virginia passed a funding act, the preamble of which (May's Comp. 14, Exhibit No. 1) of the bill, reads as follows:

> "WHEREAS, in the formation of the State of West Virginia there were included within its boundaries about one-third of the territory and population of the State of Virginia; and
>
> "WHEREAS, in the *ordinance authorizing the organization of said state it was provided* that the *said state shall take upon itself a just proportion* of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, *which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this state*, and *will continue to be made as long as may be necessary;* and
>
> "WHEREAS, the people of this commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and
>
> "WHEREAS, it has been suggested that the authorities of West Virginia may prefer to pay that state's portion of said debt to the holders thereof, and *not to this state, as the constitution of this state provides:*
>
> "NOW, THEREFORE, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt, as the same shall become due;
>
> "THEREFORE BE IT ENACTED:"

And the act proceeds to fund *two-thirds* of the debt, and to provide for the issue of certificates of Virginia for the remaining *one-third* —the payment of which

"will be provided for in accordance with such settlement as shall hereafter be had between the states of Virginia and West Virginia in regard to the public debt of the State of Virginia in existence at the time of its dismemberment."

We find here a legislative recognition of the ordinance as the sole evidence of the assumption by West Virginia of a proportion of the public debt of the commonwealth prior to January 1, 1861. The legislature of Virginia evidently regarded it as not *functus officio*, although the constitution had been adopted for some years; and this legislative declaration was despite the fact that Virginia, in her constitution adopted in 1864, which was the only organic law of the state until 1870, had attempted in express terms to repudiate the ordinance, so far as it related to the debt.

Section 27 of article IV. of the constitution of 1864 is as follows:

"SECTION 27. The *general assembly shall provide by law for adjusting* with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the states of Virginia and of West Virginia respectively * * * and no *ordinance passed by the convention which assembled at Wheeling on the 11th day of June 1861, adjusting the public debt between Virginia and West Virginia shall be binding upon this state.*"

5. VIRGINIA DOES NOT CONTEND THAT THE ORDINANCE HAS CEASED TO BE BINDING.

The legislation of Virginia, upon which was based her funding act, honorably ignored this attempted repudiation of the ordinance, and in the argument on the submission of a draft of a proposed decree the distinguished lawyer who represented the state as its attorney-general, now of counsel, in a brief filed here, said:

"While the basis of settlement prescribed by the Wheeling Ordinance is, as we have always considered it arbitrary and inequitable, we *have never taken the position that that ordinance, reasonably and fairly construed, and taken and applied together with the act of the restored government of Virginia of February 3, 1863*, and section 8 of article VIII. of the constitution under which West Virginia became a state, *was not binding on both states.*"

The learned counsel who argue for Virginia here, in their notes of argument, do not quite contend that the ordinance became *functus officio* by the adoption of the constitution.

On page 13 of their "notes of argument," they say:

> "Now the insistence of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to *be ascertained under the Wheeling Ordinance construed so as not to defeat the express controlling purpose of its enactment* and qualified and ruled by the provisions of article VIII. of the West Virginia Constitution, upon which the consent of the legislature and of the Congress of the United States to the formation of the new state, was predicated.
>
> "Agreeably to the decision of this Court in its opinion, delivered by the late Chief Justice (R., 136), the view of Virginia is, and has been, that the ordinance and the provisions of the West Virginia Constitution, should be read as being *in pari materia;* but that the constitutional provision being the latest, must prevail whenever there is conflict between them."

And it is then said,

> "as logical and inevitable consequence from this, the claim of Virginia was, and is, that, if the language of the Wheeling Ordinance is fairly and reasonably susceptible of such a construction as will, when fairly applied to the facts of the case, lead to an equitable result, and place upon West Virginia an equitable proportion of the debt, such construction should be given to that ordinance; and that, if the language of the ordinance is not reasonably and fairly susceptible of such a construction, *then the ordinance must be discarded*, and the *mandate* of the *West Virginia Constitution followed*. And that, in any event, the provisions of the constitution will govern in placing a contractual obligation upon West Virginia to pay an equitable portion of the debt of the undivided state, and to pay interest upon the same from the date when that express contractual obligation accrued, until it shall have been discharged.
>
> But the claim of Virginia was, and is further, that the provisions of the Wheeling Ordinance—fairly, sensible and justly construed, and applied, according to its manifest purpose—places upon West Virginia a just and equitable proportion of the debt; and that West Virginia

cannot be heard to repudiate this result of her own express covenant and promise."

In other words, the attitude of counsel for Virginia is, that if the ordinance, fairly, sensibly and justly construed, brings about a result which, in the opinion of the Court, is an equitable proportion of the public debt of Virginia, prior to 1861, to be assumed by West Virginia, the ordinance is binding; but if the Court shall be of opinion that the ordinance, construed in accordance with the settled rule of construction, does not produce a result which the Court regards as an equitable proportion of the public debt of Virginia, prior to 1861, to be borne by West Virginia, it was repealed by the Constitution and is no longer to be considered.

6. THERE IS NO CONFLICT BETWEEN THE ORDINANCE AND THE CONSTITUTION.

We contend that the ordinance is to be construed as any other contract would be construed: that its language is plain, and that the general words of assumption with which it begins cannot control the clear and special provisions which follow. We insist that there is no conflict between the ordinance and Section 8 of Article VIII. of the constitution. The ordinance contains substantially two provisions concerning the only matters with which the ordinance would naturally deal:

(1) That the proposed new state shall take upon itself a just proportion of the *public debt* of the Commonwealth of Virginia prior to the first day of January, 1861.

(2) The method by which it shall be ascertained which is clearly prescribed.

Two things the ordinance naturally and properly omitted:

(1) It made no provision as to the agency or tribunal whose duty it should be to ascertain the proportion by pursuit of the method prescribed by it.

(2) It made no provision for the payment of the just proportion when ascertained. These matters were left to the constitutional convention. In other words, the constitution supplies the provisions omitted from the ordinance which would obviously be necessary to carry it into execution. The one is a supplement of the other, and

there is no conflict between them, nor can any be claimed, but it is contended that if the method prescribed by the ordinance does not bring about a result which Virginia thinks is equitable, the ordinance then becomes *functus officio*, and Section 8 of Article VIII. of the constitution constitutes the entire compact between the two states. This is based upon the fact that the ordinance uses the word "just" as qualifiying the word "proportion," and the constitutional provision uses the word "equitable." It is not to be doubted, we think, that the two mean, as here used, the same thing. The constitutional convention was provided for by the ordinance. It met and adopted the constitution within ninety days of the adoption of the Wheeling Ordinance.

It is stated in the brief of the learned counsel for the "bond-holding creditors" that the same territory was represented in both bodies, and to a large extent by the same men. Probably no constitutional convention ever assembled in this country under such circumstances. It was in the midst of war, at a time of excitement and passion. There is no reason to suppose that the men in this convention who had thought out carefully the method by which the proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, to be assumed by the new state should be ascertained had either forgotten or abandoned, ninety days later, the method prescribed in the ordinance, as to the manner in which it should be ascertained. The constitutional provision was silent as to method. There was no occasion for repeating in it the language of the ordinance so recently adopted.

Virginia vs. *West Virginia*, (11 Wall. 39), decided in 1870, was a suit brought here by Virginia to have determined the true boundaries of the latter state with reference to whether three counties which, according to the contention of Virginia, were within her jurisdiction. This ordinance was treated in that case by this Court as a compact between two states, not binding, of course, until it had been ratified.

The Court said at page 59:

> "But did congress consent to this agreement?
>
> "Unless it can be shown that the consent of congress under that clause of the constitution which forbids agreements between states without it, can only be

given in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto, we must hold that the consent of that body was given to this agreement."

Virginia vs. *Tennessee*, 148 U. S. 503.
Wedding vs. *Meyler*, 192 U. S. 582.

The Court was referring there to the agreement so far as it related to the three counties.

It certainly was a compact, and wherever it was not carried into the constitution, it remains binding as such. There can be no doubt that if the constitution had been silent on the subject of the assumption of a proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, our friends on the other side would have been here claiming that the ordinance was both as to assumption and method a compact, and we do not perceive how West Virginia could have answered that claim. It might not be a binding compact until acted upon in some way by congress, but if acted upon by congress in the admission of the state, it would be binding *ex relatione* as a compact from the beginning. Its validity as a compact could not be attacked, because in our view its validity does not depend upon that provision of clause 3, Section 10 of Article I. of the United States Constitution which provides:

> "No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

The predicate of this provision is that there shall be "another state." When this ordinance was enacted there was but one state, and that was the Commonwealth of Virginia. The validity of this compact is traceable to, and well supported by, that provision of the constitution, clause I, Section 3 of Article IV.:

> "New states may be admitted by the congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states, without the consent of the

> legislatures of the states concerned, as well as of the congress."

When the congress admitted West Virginia into the Union, there were two states, and the ordinance so far as it was not merged into the constitution, was a compact binding from the beginning.

If the method prescribed by section 9 of the ordinance for the ascertainment of the proportion of the debt which the new state should assume, had produced a result satisfactory to Virginia, and the constitution had contented itself with enjoining upon the legislature to provide for the ascertainment and payment of the debt to be assumed by the new state, our friends would have been here contending that the method prescribed by the ordinance, not being in conflict with the constitution, was a compact binding upon West Virginia, and how could that contention have been successfully answered?

The circumstances under which the framers of this ordinance drew it and adopted it, the purposes to be accomplished by it, the fact so often referred to by the learned counsel of the bond-holding creditors, that the men who drafted and adopted it were West Virginians, whose homes would be in the new state, whose association has always been with the people and with the territory which were to constitute the new state, and who resented, and had long resented what they had long deemed unjust and oppressive treatment by the government of the Commonwealth of Virginia, all this is to be kept in mind.

7. THE VICE IN THE ARGUMENT FOR VIRGINIA.

The vice in the argument for Virginia is in the assumption that the ordinance is to be read as if it consisted only of these words:

> "The new state shall take upon itself a just proportion of the public debt of Virginia prior to the first of January, 1861."

If the word "equitable" had been used instead of the word "just" in the first clause of the ordinance, then, applying the method prescribed, the result must have been the same.

Section 9 of the ordinance is to be construed as a whole: and it can mean but one thing, and that is an agreement that whatever sum shall result from an accounting, in accordance with the method

specifically prescribed by the ordinance, shall constitute the just proportion of the debt which the State of West Virginia should take upon herself.

It is perfectly apparent that the ordinance was not confined to the debt. Even the first item is not limited to expenditures in the creation of internal improvements within the limits of the new state, although it is well known that it was an internal improvement debt. It says:

> "The new state shall take upon itself a just proportion of the 'public debt,' etc., 'to be ascertained by charging to it all state expenditures within the limits thereof.'"

This is not limited in scope to internal improvement expenditures within her limits. First, whatever money the commonwealth has expended in the territory in the construction of public buildings, or the improvement of public buildings, it was clearly intended should be included. Every expenditure made by Virginia within the territory of the proposed new state, which could be localized there, was to be included. Second, there was to be charged to her a just proportion of the ordinary expenses of the state government since any part of said debt was contracted.

It will be borne in mind, as has before been shown, that the Trans-Alleghany people had, for a great many years, complained publicly, in constitutional conventions, in the legislature and elsewhere, that a larger burden of taxation had been imposed upon the people living in the territory of the proposed new state than was just, from any standpoint. That Virginia had denied proper representation in the legislature to the people of the western portion of the state. That she had, while taxing them in a searching way, refused proper representation to the people of the western portion of the state, taxing them in the way of taxes on personal property, even including the interest on her own obligations, taxes on watches and plate, on carriages, and a long list of personal property; taxes on occupations and excises and taxes of every imaginable description; that she had exempted from taxation slaves under twelve years of age, unless hired to work under certain circumstances, and had taxed all slaves of greater age than twelve years, at the rate of one dollar and twenty

cents per slave, regardless, utterly, of the value of both classes—those under twelve years of age and those over twelve years of age—thus practically exempting, for the benefit of a class of property owners in the eastern portion of the state not less than $300,000,000 of marketable property; thereby casting an additional and oppressive burden upon the mountainous portion of the state, where there were, relatively, few slaves, and where the people were opposed to the institution of slavery. Those men, rightly or wrongly, considered that was the "parting of the ways" with the eastern portion of the state and her people, and that would "even up" on a just basis. They remembered that during the years from 1823 to 1861, the debt period, not a single public building had been constructed within the limits of the proposed new state; and that of the $33,000,000 of indebtedness incurred for internal improvements, only $2,800,000 at the uttermost, had been expended within her limits. And during all that time, the people felt that they had been over-taxed for the purpose of paying interest on an immense bonded debt, a trifle only of the proceeds of which had been expended within her territory, and that they had borne a larger than a just proportion of the ordinary expenses of the state government. It was, for this reason, manifestly, that there was inserted in that ordinance, as to be charged to West Virginia "a just proportion of the ordinary expenses of the state government," "since any part of said debt was contracted." And it was for this reason that, after charging both of the items to the new state, the ordinance provided for deducting from that total, "the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period."

It is said that this was an artificial and arbitrary method. That depends upon the point of view. We must take the standpoint of the men who drafted and adopted this ordinance. If the ordinance had used the word "equitable" instead of the word "just" before the word "proportion," in the first line, and had left the remainder as it stands, could the result have been any different?

The definitive words, "to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of the said

debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period," would have remained, and the result must have been precisely the same by the pursuit of the same method.

To construe this ordinance by disregarding the method prescribed in it, in order to reach a result which Virginia deems equitable, or which the Court may think ought to have been prescribed, is not to "construe" the ordinance; but is to make a new and different ordinance.

The members of the legislature of 1871, presumably, knew what this ordinance was when they embodied it in their funding act. Is it to be supposed that the men who framed the ordinance, and so carefully outlined the method to be pursued, had, within 90 days, in the constitutional convention, abandoned that method, and had intended to assume a different proportion of the debt from that assumed by the ordinance? Counsel would have the Court take an extraordinary liberty in construing the ordinance.

They say, on page 11 of their notes:

> "That ordinance purported to be an enactment of Virginia alone. It prescribed, *upon its face,* an arbitrary and what would seem to be an inequitable basis of settlement. In so far as it provided for the assumption of the new state of a "just proportion" of the debt of the commonwealth, its language was free from objection. But when it came to indicate the manner in which that proportion should be ascertained, its terms were not only artificial, but *on their face,* inequitable."

That is a matter of opinion, and, although that is the opinion of the learned counsel and of the bond-holding creditors and their counsel, that is not the question before the Court. The question is, "what was intended by the framers of the ordinance?"

8. "JUST" AND "EQUITABLE" ARE SYNONYMOUS.

We say again that there is no conflict between the ordinance and Section 8 of Article VIII. Where the latter covers the same ground as the former, there is but one change, which, in the excitement of

that day, is easily accounted for, if it requires explanation: and that is the substitution of the word "equitable" for the word "just" in the ordinance. What is the difference in common parlance between the word "equitable" and the word "just"? Webster defines "equitable" as follows:

> "Possessing or exhibiting equity; according to natural right or natural justice; marked by a due consideration for what is fair; unbaised; impartial; just; as an *equitable* decision, an *equitable* distribution," etc.

The first word he gives as a synonym is "just," followed by:

> "Fair, reasonable, right, honest, impartial candid, upright."

He defines "just."

> "That which was fitting; conforming or conformable to rectitude or justice; not doing wrong to any one; violating no right or obligation; upright; righteous; honest; true;—said both of persons and things.
>
> "3. Rendering or disposed to render to each one his due; equitable; fair; impartial, as a just duty."

He gives as synonyms of "just":

> "Equitable, honest, upright, true, fair, impartial, proper," etc.

Soule gives as the synonyms of "just":

> "1. Equitable, right, rightful, lawful, reasonable.
>
> "2. Fair, fair-minded, candid, even-handed.
>
> "3. Honest, upright, righteous, blameless, pure, conscientious, uncorrupted, virtuous, good, straight-forward."

As the synonyms of "equity," he gives:

> "1. Justice, right.
>
> "2. Justice, rectitude, uprightness, righteousness, impartiality, fairness, reasonableness, fair play."

But it seems impossible, for a moment, to consider that the use of the word "equitable" in the constitution operated to obliterate the method prescribed by the ordinance, when, if the word "equitable" had been in the ordinance instead of the word "just," the result would have been precisely the same.

9. IF THE ORDINANCE IS IN CONFLICT WITH THE CONSTITUTION THE ORDINANCE MUST BE WHOLLY ELIMINATED.

We take it to be clear that if the ordinance is to be ignored as the method prescribed for ascertaining the proportion of the debt of the commonwealth, it must be because it conflicts with Section 8 of Article VIII. of the Constitution. And if it does so conflict, it is eliminated as an entirety from this case, and is neither to be treated as a compact, nor, so far as the method it prescribes is concerned, to be considered at all. It cannot be partly in and partly out of the case; in so far as it meets Virginia's notion of what it ought to be, and out, so far as it comes within her condemnation. It must either be the basis upon which the amount is to be ascertained, or entirely discarded for that purpose.

10. WITH THE ORDINANCE ELIMINATED THE ASCERTAINMENT OF WEST VIRGINIA'S PROPORTION OF THE DEBT MUST BE LEFT TO THE LEGISLATURE OF VIRGINIA.

If the ordinance is discarded, the case rests, so far as the liability is concerned, entirely upon Section 8 of Article VIII. of the West Virginia Constitution. As we have said, this article is entirely without provision as to the rule which shall govern in ascertaining the equitable proportion. One thing only is explicit in Section 8 of Article VIII., and that is the command of the legislature found in the words:

> "And the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a Sinking Fund sufficient to pay the accruing interest and redeem the principal, within thirty-four years."

Here we have the action of the Virginia legislature consenting to and requesting, by legislative act, the admission of the state into the union under the provisions of its constitution. On the theory of the ordinance being eliminated, this is clearly a compact to the effect that the proportion of the public debt which the new state shall bear is to be ascertained by her legislature. This commits entirely to the legislature the ascertainment of the equitable proportion of the debt which the new state shall bear, and enjoins upon it the

necessity of using in the discharge of that duty all practicable speed. *Ex necessitate rei*, this not only gives to the legislature the power, but imposes upon it the duty, of choosing the method by which the equitable proportion shall be ascertained, and its action in that respect would not be subject to judicial review. This made of it a legislative question. It left it to the sense of justice of the tribunal which the constitution selected for its ascertainment. The legislature might ascertain it through a joint committee of the two houses, or it might provide for the appointment of a commission, instructing it as to the basis upon and a method by which it should be ascertained and reported to that body. It is urged against this view that it never could have been intended that the debtor state (if it should turn out on the accounting to be a debtor state), should be left to determine the proportion which it should assume. It is a sufficient answer to this to say that it was plainly and unmistakably done. The legislature was placed in the position sustained by the legislature of a state as to the selection of the method of ascertaining and prescribing the proportion of the debt of a county or town which is divided. And in such cases the courts have held, including this Court, that the question, "what proportion of the debt of a county or a city or a town which is divided by legislative authority, shall be borne by the portion set off to make a new town, or included within the boundaries of another county, city or town" is a legislative question and not a judicial one. *Commissioners of Laramie Co.* v. *Commissioners of Albany Co.*, 92 U. S. 307; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514. If the Legislature of West Virginia has failed, with or without justification, to discharge its duty imposed upon it by the constitution, what is the remedy? It has not yet been decided that any Court can mandamus a legislature to pass a law, or can restrain it in the exercise of its functions. It cannot enjoin it from passing an unconstitutional measure, albeit it may overturn the measure after it shall have been passed. Whether the Legislature of West Virginia is to be justly reproached for not having acted, is a question that will be considered later. And if the legislature had proceeded to the ascertainment of the amount of the debt—the just proportion which should be assumed by West Virginia—either by its own committees or by a commission, could the court overturn its ascertainment upon the ground that it had

not adopted the proper basis or method as between population, area or assessed valuation? When the power is unqualifiedly committed by a constitutional provision to the legislature, can any court control the exercise of that discretion as to the selection of the method by which the proportion of the public debt which the new state shall assume is to be determined? When the legislature in the exercise of its power and discretion shall have ascertained what it regards as an equitable proportion of the debt, can any court overturn that determination because in its opinion the proper method was not pursued, and the result does not in *its* opinion constitute an equitable proportion? The plain truth seems to be that the matter—the ordinance being out of the case—was left by the legislature of Virginia and by the congress to the honor of the Legislature of West Virginia. This is nothing new in our system. Since the adoption of Article XI. of the Constitution:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state,"

No state can be sued, even in this court or in other Federal courts, by citizens of another state or by citizens or subjects of any foreign state. Whether suit may be brought in a state court by an individual against the state in one of her own courts depends upon her own consent, as evidenced by her own laws. So that every citizen of the United States and every subject of a foreign state who buys a bond of a state, takes it with full notice and knowledge that the payment thereof and of the interest thereon rests, in the last analysis, upon the honor of the state whose obligation it is.

11. WITH THE ORDINANCE ELIMINATED IS THE MATTER JUSTIFIABLE?

The case of *County of Tulare* v. *County of Kings*, 117 Cal. 195, throws light upon this question.

Section 3 of Article II. of the Constitution of California is as follows:

> "Every county which shall be enlarged or created from territory taken from another county or counties

> shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken."

The County of Kings, in the State of California, was created wholly out of Tulare County, and was fully established May 23, 1893. It was contended that on that date there were outstanding $22,000 of court house and $5,000 of road bonds, and that the plaintiff county, Tulare, between May 29, 1893, and September 18, 1895, had paid, on account of said bonds, $14,472.46; that on the assessment rolls of the two counties, as the basis of apportionment, the amount due from defendant was $4,615.22, which, with interest due, would make $5,049.61, due October 11, 1895; that this claim had been presented, etc., to the supervisors of Kings County and rejected, when action was brought against Kings County to recover the sum. A demurrer being sustained, the case was taken to the supreme court.

The contention in the supreme court was that the defendant was liable under the constitution.

The Court said:

> "The contention of plaintiff is that by the supreme law of the state it has been declared that the new county shall pay a *just proportion* of the debts of the old county and it is left with the courts to determine what that *just proportion* may be in a case presented. In other words, it is denied that the legislature has any power to apportion the indebtedness, but that this question as to how much this just proportion will amount to is purely judicial.
>
> "On the other hand, defendant contends that the sole question is whether the action will lie against defendant, the legislature having failed to provide in the act creating Kings County for the apportionment of the public property and debts of the County of Tulare."

The court held, on the strength of a prior decision, that the constitutional provision was a restriction upon the power of the legislature to divide a county, and that the power still remained with the legislature to divide counties and that where a county was divided by the legislature without any provision as to the apportionment of the debt the presumption was that the legislature thought no apportionment was required.

The Court added:

> "It would seem to me, if the courts should undertake to determine this question upon the authority of the constitution alone, they would have neither compass nor rudder by which to be guided."

The case was ruled largely by the opinion of the supreme court in *Los Angeles County* v. *Orange County*, 97 Cal. 329, of which decision the opinion says:

> "The learned justice, in delivering the opinion of the court, called attention to the established rule that where no provision is made by the legislature as to the debts of the old county they remain with the old county. He then takes up the constitutional provision in question, and says: 'The mode of determining the 'just proportion' of the debts and liabilities for which the new county shall be liable, is not prescribed in the constitution, *but is left to the determination of the legislature in each particular case*'; he points out that the legislature did provide a mode of ascertaining the 'just proportion' of the debts by the appointment of commissioners, and limited the liabilities to those existing at the time the act took effect, and he says: 'As the legislature could divide the public property and assets of the county in such mode as it might choose, it was competent for it to fix upon a date, which it might select, as the time for ascertaining their amount and value, *as well as determining in connection therewith the 'just proportion' of the debts and liabilities to be assumed by the new county. In the present instance the legislature fixed the time when the act took effect as the proper period for ascertaining the amount of these assets and liabilities, and it cannot be held that the constitutional provision was violated in selecting that as the point of time at which to properly determine what would be a 'just proportion' of the debts and liabilities to be assumed by the new county.*' The expenditures for which the claim was made were incurred in the new county prior to its organization, but after the date of the act, and the commissioners had reported these separately, with the remark, 'that as a matter of equity the amount should be refunded by Orange county to Los Angeles county.'

The opinion upon this point continues: 'The legislature may have considered that it would be necessary for the County of Los Angeles to expend the money for municipal purposes within this territory; *and as it was within its discretion to determine that it should bear the burden of any of the expenditures which it might thus make, the fact that it has made no provision for its reimbursement is indicative that it was not its intention that it should be reimbursed therefor.*'

"Now, this was just such a claim as counsel for plaintiff insists must be heard and determined by the judicial arm of the government, and that over it the legislature has no jurisdiction or power whatever. It seems to me the decision necessarily settles the very question here—that it is a legislative and not a judicial function. Upon plaintiff's theory it was the duty of the court to overrule the demurrer and proceed to hear and determine what the 'just proportion' of the debt of Los Angeles county was that should be borne by Orange county; but the court found no cause of action stated, because the legislature had disposed of it, and because it was a legislative function and not a judicial one. (See, also, *County of Orange* vs. *Los Angeles County*, 114 Cal. 390.)"

County of Tulare vs. *County of Kings*, 117 Cal. 195.

If the liability of West Virginia is to be determined under Section 8 of Article VIII. of her Constitution, without reference to the ordinance, then the grounds for holding that the legislature of West Virginia is the only tribunal which can ascertain the amount of her liability are much stronger than those upon which the California court, in the case just cited, decided that it had no jurisdiction; since the Constitution of West Virginia expressly provides that the legislature shall ascertain the equitable proportion of the debt to be assumed. The California constitution contained no provision of this character.

We recognize, of course, the fact that the power of the legislature to apportion the indebtedness of counties exists in case of division, as an incident to their power to divide such municipalities. These are public corporations, created for political purposes, and they have no contract rights to continued existence. They are subject, at all times, to legislative change. But the power which the legislature has to

create them, and divide them, and, therefore, the incidental power to apportion their liabilities, while it proceeds from the power to create them, is no more direct and unlimited than the power with which the Constitution of West Virginia clothed the legislature of that state, in respect to the method of ascertainment, and otherwise, of the proportion of the public debt which would constitute an equitable share for West Virginia to pay.

The question is not whether it was wise for the Legislature of Virginia to consent to the admission of the State of West Virginia, under Section 8 of Article VIII. of her Constitution, vesting such a power in her legislature. The question is, did they do it? The ascertainment is, certainly, in its nature, a legislative function. In the exercise of its legislative powers, the legislature may provide for examination. It must, ultimately, pass upon the result. It may have done it on several bases or theories; but it must, in the end, select the basis, for it must provide for the payment.

The constitutional provision, without the ordinance as a guide as to method, seems to submit to the Court a question which is not judicial in its nature. The case in that respect, as well as others, is unique. It does not differ much, in the aspect of it which we are now considering, from the case of *Taylor* vs. *Brewer, et als.*, 1 Maule & Selwin, 290, and *Cummer* vs. *Butts*, 40 Mich. 322.

In the former case plaintiff founded an action of assumpsit on an agreement by defendant that any service by plaintiff should be taken into consideration, and such remuneration be made as should be deemed right.

The court refused to set aside a non-suit.

Lord Ellenburough, C. J., said: "Here, I own, it struck me, was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labor deserved anything he should be recompensed for it by the defendants."

Grave, J., said: "I consider the resolution to import that the committee were to judge whether any or what recompense was right."

Le Blanc, J., said: "It seems to me to be merely an engagement of honor."

Bagley, J., said: "The fair meaning of the resolution is this, that

it was to be in the breast of the committee whether he was to have anything, then how much."

Cummer vs. *Butts* arose on a contract for the sale of lumber which stipulated that either party might cancel the contract "for good cause."

One of the parties terminated the contract, whereupon the other party, who insisted that no good cause for cancellation existed, brought suit.

Judge Graves said: "The difficulty is inherent. It exists in the terms adopted by the parties. The requirement of good cause as something on which the right to revoke by one or the other should depend, is, as here introduced, too vague to be fairly intelligible. It is manifestly applied to each party, but the phrase 'good cause' in such connection, as to parties and subject matter, has no distinct sense as to furnish a common and intelligible criterion for the parties, or any determinate sense whatever. It is impossible to say that the wills of the parties concurred and that each meant exactly what the other did, or even to say what either meant. The room for difference of opinion is immense, and the case is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainly by judicial effort."

12. THIS COURT HAS DECLARED THAT THE ORDINANCE AND THE CONSTITUTION DO NOT CONFLICT AND ARE TO BE READ IN PARI MATERIA.

When this case was argued here on demurrer, counsel for defendant contended that the Court did not have jurisdiction to determine the prinicple upon which West Virginia should be made liable for any portion of the old debt of Virginia because this was a matter which the Constitution of West Virginia had referred to her legislature. Hence, it was argued, the consent of Virginia to the admission of West Virginia into the union, under the provision of that constitution, and the action by congress admitting the new state, constituted a compact between Virginia and West Virginia, which operated to commit to the legislature of the latter state the ascertainment of what would be a just and equitable proportion of the debt to be assumed, including the basis and method upon and by which it should be ascertained.

The Court in reply to this argument resorted to the ordinance which prescribes the method of ascertainment and thereby defines the proportion which should be assumed. The Court said, through the Chief Justice (206 U. S. 290, 319):

> "It is, however, further insisted that this Court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of congress, by which the question of the liability of West Virginia to Virginia was submitted to the arbitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the Constitution of West Virginia, when admitted into the union contained the provision: 'An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by this state, and the legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years.' And it is said that, on May 13, 1862, the Legislature of Virginia passed an act entitled 'An act giving the consent of the Legislature of Virginia to the formation and erection of a new state within the jurisdiction of this state,' by which consent was given to the creation of the proposed new state, 'according to the boundaries and under the provisions set forth in the constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861;' and that by the act of congress, the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two states. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided 'for the formation of a new state out of the territory of this state,' and declared therein that 'the new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January,

> 1861,' to be ascertained as provided, it is to be supposed that the new state had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should 'ascertain the same as soon as practicable,' it *referred to the method of ascertainment* (italics not the Court's) prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia*, it follows that what was meant by the expression that the 'legislature shall ascertain' was that the legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained."

While nothing has been settled in this case except the question of jurisdiction, it is quite difficult to conceive upon what principle Section 8 of Article VIII. of the Constitution can be read without reference to Section 9 of the ordinance; and there is no point in reading it in connection with Section 9 of the ordinance except that the ordinance furnishes, and nowhere else is it to be found, the intention of its framers as to the method which should be pursued in ascertaining the result which would constitute the just or equitable proportion intended to be assumed. Reading the ordinance *in pari materia*, with Section 8 of Article VIII. of the Constitution, incorporates into that provision of the constitution all of Section 9 of the ordinance relating to the method prescribed for the ascertainment of the proportion of the debt which the new state was to assume.

Exceptions to the Master's Report.

Pursuant to the interlocutory decree, there has been an accounting before the Master on the basis of the ordinance, and, alternatively, on the other *bases* indicated by the decree. A large number of exceptions have been filed, by both parties, to the findings of the Master. Most of these exceptions have been fully argued in Part II. of this brief. It is admitted that the amount of the public debt, on January 1, 1861, was $32,919,863.93; nor is there any dispute that this debt was incurred for works of internal improvement, as alleged in the bill, and admitted in the answer.

1. THE MASTER WAS RIGHT IN HOLDING THAT BONDS HELD BY THE SINKING FUND AND BY THE LITERARY FUND WERE NOT A PART OF THE PUBLIC DEBT OF VIRGINIA.

The only difference that arose under Paragraph II. of the decree between the complainant and defendant is whether the bonds of the commonwealth held by the Sinking Fund of $1,369,243.92, and by the Literary Fund, $1,116,843.35, with accrued interest amounting to $15,895, are part of the debt.

As to the latter, after investigation by counsel for the complainant, it was conceded that the bonds were in possession of the board of public works for sale; but have never been disposed of, and were, therefore, not a part of the public debt. As to the other two items, the master held that the bonds were the property of Virginia, and were no part of the public debt on January 1, 1861. This question is elaborately discussed by the Master in his report.

We are content to rest the question whether the bonds in the Literary Fund and the Sinking Fund were part of the public debt of the Commonwealth of Virginia, on January 1, 1861, upon the reasoning and citations of the Master, calling attention only to one or two authorities which are not cited by him.

In *Board of Public Works, etc.*, v. *Gannt*, 76 Va. 465, the court said:

> "The bills are against the board of public works and the board of education. Although the persons composing those boards are made parties, in their individual character, no relief is asked against them as such, and it is obvious that as individuals they have no sort of concern or interest in the question. The acts complained of are acts of the legislature, and the relief sought is against corporations composed exclusively of officers of the state. The bill is precisely such as it would have been if the appellees were proceeding against the state.
>
> "*Conceding that the fund in controversy is subject to a pledge on behalf of the public creditors, it is still the property of the state as absolutely as any of the money in her treasury, or the capitol square and public buildings.*
>
> "It is none the less in her possession because it is

> under the control of the board of education, for that board is a mere agency of the state, having no existence or power independently of the state. As was said by Judge Anderson in *Clarke* v. *Tyler*, 30 Gratt. 159: 'After money is set apart as a literary fund, the commonwealth is still the sole owner of it, as she is of all the funds and property of the board of education and the other corporations, which are composed of officers of the government, the funds and property of which are the sole property of the commonwealth.'"

It would seem to be clear that the property of Virginia could not very well be a part of the public debt of Virginia. Such bonds are not outstanding obligations of the state. When the bonds were purchased by the state, the debt was *pro tanto* discharged, and the bonds were then no more the obligations of the state than if they had never been negotiated.

At the foot of the opinion is the following:

> "NOTE BY JUDGE STAPLES.—'Since the foregoing opinion was delivered, the decision of the Supreme Court of the United States in the case of *John Elliott and als.* v. *The Governor, Lieutenant-Governor, Auditor, and other State Officers of Louisiana*, has been rendered. The reasoning in that case sustains fully the views presented in my opinion.'"

(The case to which Judge Staples refers is reported under the title of "*Louisiana* v. *Jumel*" and "*Elliott* v. *Wiltz*," 107 U. S. 711.)

2. THE MASTER WAS RIGHT IN EXCLUDING UNDER PARAGRAPH III. OF THE DECREE EXPENDITURES BY CORPORATIONS IN WHICH VIRGINIA WAS A STOCKHOLDER.

Paragraph III. of the Decree required the master to ascertain and report:

> "All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted."

We agree with the Master that the paragraph was based upon that portion of the Wheeling Ordinance which reads:

> "The new state shall take upon itself a just pro-

> portion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it *all state expenditures within the limits thereof.*"

We do not agree that the discussion by the Master of the question which arose under this paragraph, as to the doctrine of "equitable construction," was at all warranted by any question which arose, or could arise, under the third paragraph, and insist that the question is one of law, which the Court did not commit to the Master. The sole question under that paragraph, committed to the Master, was to ascertain and report:

> "All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

(*a*) THE MASTER'S FINDING.

The complainant claimed that $5,639,302.66 had been expended by the state within the designated territory (Record, p. 371, c. 1, p. 1).

The amount conceded by the defendant was $1,251,288.92.

The question as to the items 2, 3, 10, 11, 12, 13, 14, 25, 28, 35, 55, 150, have been fully argued in another portion of the brief.

The Master allowed, to which the defendant excepted, in addition to the conceded sum, $1,560,271.06, making $2,811,559.68, rejecting claims insisted upon under this paragraph by the complainant, amounting to $2,827,742.68.

(*b*) THE REJECTED CLAIMS REPRESENTED EXPENDITURES BY PRIVATE CORPORATIONS.

The claims rejected represented the expenditures within the State of West Virginia, except as hereinafter stated, by private corporations created by Virginia by special act, which possessed under her general laws all the faculties of a corporation, including perpetuity, the right to have a common seal, to be managed by a board of directors, to issue stock, to the stock of which corporations Virginia had subscribed through her board of public works duly thereunto authorized by law in conjunction with solvent citizens, either two-fifths or three-fifths, as the special act provided. The Master was clearly right in

excluding these as state expenditures within the Territory of West Virginia. The money paid in by the state and other stockholders to the treasury of the corporation on their respective subscriptions became the property of the corporation. For such payments the stockholders each received stock representing his interest in the company's property. The distinction between the stockholder and the corporation is too well settled to require argument. The improvements made through the expenditure of the moneys thus paid into the treasury of the corporation was its property. This property did not belong to the state, nor did it belong to the stockholders. The state in subscribing to the stock carried none of its sovereignty into that relation. It stood before the law in respect of ownership and control precisely as individuals or private stockholders stood. This has been long settled by the decisions of this Court.

(*c*) VIRGINIA LEGISLATURE AND COURTS RECOGNIZE THE DISTINCTION BETWEEN PRIVATE CORPORATIONS WITH STOCK AND PUBLIC CORPORATIONS WITHOUT STOCK.

The Virginia legislation recognizes the distinction between private corporations and public corporations. In several instances the legislature created public corporations composed of the governor, the attorney general, and some other official of the state, through which to construct works of public improvement. These corporations had no stock. The corporations were simply the agents of the state, each without stock; their property was the property of the state. The Supreme Court of Appeals of Virginia held that such a corporation was not liable for damages caused in the construction of an improvement, or in its management.

Sayre v. *The Northwestern Turnpike Road*, 10 Leigh 454.

These private corporations, on the other hand, in which the state had taken stock in conjunction with others, were, in respect of suits, subject to the same laws as other private corporations throughout the state, to which the state sustained no relation whatever except as a sovereign. In the case of *James River, &c.*, v. *Early*, 13 Grattan 541, cited by the Master and in Part II. of this brief, which was an action

to recover for the negligence of the corporation and in which the right to sue the corporation was raised, the Supreme Court of Appeals distinguished that corporation from the public corporation involved in the Sayre case.

We do not suggest that the primary motive of the state in subscribing to the stocks of such companies to secure the construction of highways, bridges and railways, and the improvement of rivers, and works of public convenience and benefit, was to make money. She borrowed the money to pay her stock subscriptions in almost every one of these cases. In each case, the loan was authorized by the act of the legislature which created the corporation. And in each case the evidences of debt, which were certificates of stock issued by the state, contained a reference to the particular act under the authority of which the loan was made, and the Court will see in the schedule annexed to the Master's report opposite the name of each of these corporations the purpose for which the loan was created, giving the act by date, and also the number of the loan, its maturity and amount. On principles of international law, upon the division of Virginia by the separation of the territory now constituting West Virginia, and her admission into the union as a state, the public improvements, public buildings and other governmental property within West Virginia, would pass by the fact of separation to the new state; and the latter would be obliged on principles of international law, as she took the property, to bear not a part, but the whole debt which had been incurred in its creation. It would be a debt running with the land, an obligation not secured by a mortgage upon the territory of the new state and localized in that way, but a debt *contracted with reference to, and for the benefit of, the territory embraced* in the new state. It would be manifestly impossible for the State of Virginia by any act of her own, or any agreement between her and the proposed new state, to convey to the latter the property of the corporations in which she was a mere stockholder, for she would not have any property to convey except her stock; manifestly she could not transfer the private property of the corporation; nor could the interest of the private stockholders in the corporation be displaced by any agreement made by the commonwealth in respect to it.

(*d*) VIRGINIA ACT OF 1863 TRANSFERRING TO WEST VIRGINIA PROPERTY WITHIN HER BOUNDARIES.

No change of the government of the old state, or its territory, could change in the slightest the corporation ownership, or release it from its duties under its charter. It would be subject, perhaps, to a new master; and this was evidently Virginia's notion of it in '63. The act of February 3, 1863, passed by the restored gowernment, Chapter 15, Appendix to the Record, page 128, provides:

> "That all property, real, personal and mixed, owned by or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance, transfer or delivery than is herein contained; and shall include among other things not herein specified, all lands, buildings, roads and other internal improvements, or parts thereof, situated within the said boundaries, and now vested in this state, or in the president and directors of the board of the literary fund, or the board of public works therefor, or in any person or persons, for the use of this state to the extent of the interests and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any *parent bank or branch* doing business *within the said boundaries;* and all *stocks of any other company or corporation,* the principal office or place of business whereof is located within the said boundaries standing in the name of this state or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this state."

It was admitted on the record by the defendant that the principal office or place of business of any corporation whose works were wholly within the State of West Virginia, was within the State of West Virginia, and came within the provisions of the act. Section 2, transferred unpaid and uncollected, arrearages of taxes on lands, lots, of all description, fines imposed by courts, forfeitures and penalties, &c., &c., dividends on stock owned by the state or by the board of public works

or the literary fund, in any bank, bridge or other corporation, and various other items which need not be mentioned. Section 5 provided that:

> "If the appropriations and transfers of property, stocks and credits provided for by this act take effect, the State of West Virginia *shall duly account for the same* in the settlement hereafter to be made with this state: provided that no such property, stocks and credits shall have been obtained since the re-organization of the state government."

(*e*) THE TRANSFERS OF PROPERTY TOOK PLACE.

That the transfers did take effect, is apparent from the legislation of West Virginia, put in the record by the complainant, and will be found in the appendix. If by that act Virginia had transferred to West Virginia her interest in the property, and had provided simply for the transfer of the stocks or property of corporations in which her stock represented her interest, it might be thought that it was intended as a mere muniment of title; but the provision that she shall *account for it hereafter in the settlement to be had between the two states gives to it conclusively a different aspect.* This act is set out in Paragraph VIII. of the bill. And it is alleged in this paragraph that:

> "The property which was by the operation of this act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate to several million of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury from the sale thereof about $600,000; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861."

(*f*) WEST VIRGINIA CANNOT EQUITABLY BE CHARGED BOTH WITH THE VALUE OF THE STATE AND WITH THE EXPENDITURES MADE BY THE CORPORATIONS.

And the Master finds that the amount due Virginia on account of the stock of the Northwestern Bank of Virginia and of the Fairmont Bank is $477,250; and he also adds $7,578, stock of the Sweet & Salt Sulphur Spring Company; $4,000, stock of the White & Salt Sulphur Spring Company; $12,000 for stock of the Fairmont & Palatine Bridge Company, making in all $500,828. No evidence was offered, upon which he could find, nor does he find, the value of the other stocks at the time of the transfer under the act of 1863 to the defendant. It is admitted that they were of no value. Before that date the property of such corporations had to a considerable extent been destroyed by the troops of Virginia acting in co-operation with the Confederate States, stocks of the bridge companies and the turnpike companies. If there had been evidence upon the part of the plaintiff that the stock other than bank stock; in other words, the stocks of the private corporations created to build bridges, turnpikes, and other works of internal improvement, whose principal place of business was in 1863 in the territory of West Virginia were worth par when transferred, he would have been obliged to find in favor of West Virginia for all the stocks at par. That it is confessed on the record that they were worthless at the time they were transferred does not change in the slightest the status or the principle. Upon this basis, it is perfectly apparent that it was the understanding of the legislature that the expenditures by these companies of their money within West Virginia could not be considered state indebtedness; otherwise, if West Virginia were obliged to pay for them as *state expenditures* and also to pay for the *stock*, the defendant would be subjected to double payment for the same thing, which, of course, never could have been intended. It is thus apparent that not only was the Master right, as a matter of law, in rejecting under Paragraph 2 expenditures by these corporations as state expenditures, but that this could not have been the understanding of Virginia, as shown by the act of 1863. And it will not escape attention that the act of 1863 in respect of all the items embraced in it, stocks and improvements, localized them, just as the ordinance localizes expenditures. The

act of 1863 was based upon territorial limits. It can hardly be possible that West Virginia *could equitably be held responsible* for these stocks under the act of 1863 at par if they *were worth par,* and also be responsible for all, or a part, of the moneys which Virginia had *borrowed with which to purchase them.* That would be unique for want of equity:

(*g*) COUNSEL FOR VIRGINIA BEG THE QUESTION.

Counsel for Virginia on page 21 of their Notes of Argument say:

> "In considering the questions which are presented by the controverted items in the schedules filed under this paragraph it is important always to bear in mind the precise language of the decree which, following the terms of the Wheeling Ordinance, directs the ascertainment of:
>
> 'ALL *expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.'
>
> "It is manifest that that language in explicit and comprehensive terms embraces without exception or qualification, all expenditures of whatever character or description, and on whatever account, or for whatever purpose, or in whatever manner made, which were made by the Commonwealth of Virginia in any part of the territory now constituting West Virginia, after March 19, 1823, the agreed time at which any part of the debt in question was contracted."

This is *petitio principii.* The question is whether an expenditure by Virginia in the purchase of stock of a corporation, which corporation is authorized to construct a work of internal improvement within the territory of what is now West Virginia, is an expenditure "*made* within West Virginia could not be considered state expenditures: *made in West Virginia by a corporation in which Virginia is a stockholder.* The learned counsel have emphasized the capital letters and italics in the wrong place. The point is not there; the capitals and the italics, both, should be transferred from the words "*all expenditures*" to the words "*made by the Commonwealth of Virginia.*"

Pile, etc.

3. THE MASTER WAS WRONG IN FINDING THAT INTEREST ON THE PUBLIC DEBT OF VIRGINIA WAS PART OF THE ORDINARY EXPENSE OF THE STATE GOVERNMENT.

If the state chooses to create corporations, and invest in their capital stocks, for the making of internal improvements, and borrows the money for the purpose of paying her stock-subscriptions, while she does it upon her credit as a sovereign, the use to which she devotes the money is not a *governmental* use; but is a commercial use.

While the debt, as between the bondholders and the state, is the debt of a sovereign state, the property acquired is an investment. It is, in no sense, governmental. It is commercial. And to say that the interest annually accruing upon such a debt is an ordinary expense of state government, seems to be absurd. To say that it is even an ordinary expense of a state, as a sovereignty, is not maintainable.

Is it conceivable that the framers of this ordinance could ever have been induced to agree to the proposition, or have contemplated, that by its provisions they were binding the new state to pay, under the guise of ordinary expenses, nearly $4,000,000 of interest on the moneys borrowed by Virginia to invest in capital stocks of corporations, which, on the separation, she was to keep, and did keep, as well as all of the internal improvements which that stock represented?

The Master finds the ordinary expenses of the state government of Virginia, during the debt period; that is to say, from March 19, 1823, to January 1, 1861, to have been $40,274,896.70, including interest on the public debt during that period, amounting to $18,574,747.84, leaving as the sum for ordinary expenses of the state government, excluding interest, $21,700,148.86, of which he assigns to West Virginia $4,161,352.99. This ascertainment and apportionment was excepted to by the defendant. He also assigns to the defendant, $3,986,102.93, as its proportion of the interest paid on the public debt during the debt period, which he includes as a part of the ordinary expenses of the state government. To this, the defendant excepts.

(*a*) THE LANGUAGE OF THE ORDINANCE.

Section 9 of the Wheeling Ordinance, in which the words to be construed occur, is as follows:

> "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the *ordinary expenses of the state government*, since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period."

(*b*) DEFENDANT'S CONTENTION.

The defendant contends that upon every principle of construction, by the plain meaning of the words "ordiary expenses of the state government," by the interpretation which results from reading section 9 of the ordinance as a whole, by the meaning which the words in question have acquired from common use in the constitutions and statutes of the different states as well as by the great preponderance of judicial interpretation in cases where these words have been construed interest on a public debt, especially where such a debt was incurred for extraordinary purposes, cannot properly be included among the ordinary expenses of a state government.

(*c*) INTEREST ON A STATE DEBT IS NOT AN ORDINARY EXPENSE OF GOVERNMENT BECAUSE IT IS PAYABLE ONLY DURING A LIMITED PERIOD.

The adjective "ordinary" fixes the character of the expenses of the government with which the ordinance charges West Virginia. An ordinary expense of government is one which ordinarily recurs so long as government exists. It is obvious that interest on a state debt does not belong to this category. A state debt is a temporary obligation to be discharged at an agreed time by payment. The ordinary expenses of a state government, however, never cease. So long as the government exists, expenses for its support, for the maintenance of the legislative, judiciary and executive departments, for the performance

of the various duties which they owe to the people will annually recur and must be met. Even if it were proper, as we do not think it is, to describe payments upon a bonded state debt as an expense of government, is it not too clear for argument, when we find that payments upon such a bonded debt are by the terms of the contract creating the debt only to continue during a specified limited time, while ordinary expenses of the government must continue indefinitely, that the term *ordinary* expenses must be applied exclusively to the latter class of expenses, and cannot be deemed to include the payments on the debt which are to cease after the expiration of the time fixed by the contract?

(*d*) INTEREST ON THE OLD VIRGINIA DEBT WAS NOT AN ORDINARY EXPENSE OF GOVERNMENT BECAUSE THE DEBT WAS INCURRED FOR EXTRAORDINARY PURPOSES.

In considering whether interest on a state debt is one of the ordinary expenses of a state government, it is important to bear in mind the purposes for which the debt was incurred. The debt of Virginia to which the Wheeling Ordinance refers, was incurred for internal improvements. The proceeds of the Virginia bonds were either directly applied in the construction of highways, railways, bridges and similar improvements, or to the purchase of stock in corporations which applied the money in the construction of such internal improvements. These improvements were of a permanent character, and in constructing them the state was making a permanent investment. We do not understand that there is any dispute that expenditures for works of internal improvements are extraordinary and not ordinary expenditures. The Master's report (page 112) states that "the question as to what is an extraordinary expense seems to be well settled," and the cases which he cites in illustration decide that expenditures for permanent improvements are extraordinary expenditures. All the authorities on this question are in agreement. A number of state constitutions prohibit the state from expending money on works of internal improvement. This shows the impossibility of regarding such an expense as an ordinary expense of government. If the principal of some of the Virginia bonds issued for internal

improvements had fallen due within the period covered by the ordinance and had been paid to the bondholders, is it not manifest that this payment for an extraordinary purpose, a payment which could be made only once, could not be deemed an ordinary expense? And if payment of the principal debt would not be an ordinary expense, on what theory can payment of the interest, which is merely incidental to the principal debt, be so regarded?

(*e*) THE FACT THAT THE INTEREST WAS PAYABLE AT REGULAR INTERVALS DID NOT MAKE IT AN ORDINARY EXPENSE.

The only circumstance which gives any semblance of plausibility to the claim that interest on the Virginia debt was an ordinary expense of the state government is the fact that the interest was payable at regular intervals until the principal fell due and was paid. We have already pointed out that the annual recurrence of an interest charge during a *limited* period does not make the interest an *ordinary* expense. Suppose the state had made a contract for the construction of works of internal improvement, under which payment therefor was to be made in equal semi-annual installments during a period of years. Would it be possible to claim that the payment of such installments was an ordinary expense of government?

(*f*) INTEREST IS NOT PROPERLY DESCRIBED AS AN EXPENSE.

Leaving out of consideration the force of the adjective "ordinary," it would still be not in accordance with the common use of language to describe the payment of interest on a funded public debt as an *expense* of *government*. The difference between expense and debt in the common use of language is well expressed by Judge Spencer in a Louisiana case as follows: "In common parlance there is, no doubt, a distinction in the meaning of the words debts and expenses. The latter is usually applied to those current temporary obligations which are met by payment as they arise, while the former designates obligations of a more enduring kind" (*State ex rel.* vs. *State Auditor*, 32 La. Ann. 89, 90).

A striking illustration of this distinction is found in the provisions of state constitutions relating to taxation and revenue. In most of the

states the constitutional provisions concerning taxation and the appropriation of revenue expressly provide for the payment of the expenses of government, and *also* for the payment of the public debt and interest thereon. Clearly the men who framed these constitutions would not have provided separately for the payment of the principal and interest of the public debt, if they had supposed that such payment fell among the expenses of government for which they had already provided. We shall subsequently call the attention of the Court to the specific constitutional provisions to which we refer.

(*g*) THE DISTINCTION BETWEEN THE STATE AND THE GOVERNMENT OF THE STATE.

The Wheeling Ordinance expressly discriminates between the state and the government of the state. According to the ordinance, "the new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia." The public debt to be assumed is the debt of the Commonwealth of Virginia and not of its government: and the new *state*, not the *government* of the new state, is to take upon itself a just proportion thereof, which is to be ascertained "by charging to it all the *state* expenditures within the limits thereof and a just proportion of the ordinary expenses of the state *government*." All *state* expenditures within the defined area are to be charged and in addition a part of all the ordinanry expenses of the state *government*. It is a cardinal principle of construction that effect must be given to every word in a written instrument. In the ordinance no effect can be given to the word "government" unless it is construed as meaning something different from the word "state." If this is granted, then the conclusion follows that under the ordinance payment of the public debt of Virginia, if it is to be regarded as an "expense," is an expense of the *state*, and not of the *government* of the state, because the ordinance describes the public debt as the "debt of the Commonwealth of Virginia," that is to say, of the *state*. The state may have expenses which are not the expenses of the state government. If a state fails to pay interest on its bonds, its credit is affected, and it is an event to be deplored; but the government of the state must go on just the same. The distinction drawn by the ordinance between the state and the government of the state is a real and not an artificial

distinction which this Court has recognized in *Texas* v. *White*, 7 Wall. 700, and in *Poindexter* v. *Greenhow*, 114 U. S. 290. In the former case Chief Justice Chase delivered the opinion of the Court, and in enumerating the various senses in which the word state is used said: "And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government. In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every state in the union a republican form of government, and shall protect each of them against invasion. In this clause a plain distinction is made between a state and a government of a state." We think the language of the ordinance plainly shows that the words commonwealth and state are therein used in the primary sense of a people or political community as distinguished from the government. Such an interpretation is in accordance with the actual fact. Under American institutions the government of a state has no validity except as representing the people who compose the state. When a public debt is contracted it is not the government, but the people of the state who become liable for its payment. The government merely acts as the agent of the people in the transaction. In the case of this debt of Virginia this is peculiarly true. The whole debt which is the subject of this suit was incurred for internal improvements, matters in which the people were interested, from which the people might anticipate benefits in the conduct of their trade and commerce, but which have no relation to the work of government. How can the payment of such a debt or of the interest thereon be regarded as an expense of government? Suppose a private individual entrusts the conduct of his affairs to an agent, who, in the course of his employment, executes a note on behalf of his principal. Would it not be doing violence to the ordinary sense in which language is understood to include payment of the note or of interest thereon among the expenses of the agent? In the case of business corporations, the word government is not used to describe the agents who conduct the business, but the work performed by them is commonly described by the word management, and the expenses of the management of a private corporation, in the largest sense, are called operating expenses. We submit that no instance can be found in the

records of private corporations where the payment of interest on bonds of such a corporation is treated as an operating expense.

(*h*) FINANCE PROVISIONS OF STATE CONSTITUTIONS SHOW THAT INTEREST ON A STATE DEBT IS NOT REGARDED AS AN EXPENSE OF GOVERNMENT.

The provisions of the state constitutions relating to taxation and revenue are helpful in considering the phrase "ordinary expenses of the state government." The constitutions show two things, (1) that the creation of a public debt is not an ordinary, but an extraordinary matter, and (2) that the phrases "expenses of the state" and "expenses of the state government" do not apply to the payment of interest on state bonds. Examination of the constitutions makes it plain that the founders of state government intended that ordinary expenses should be defrayed out of funds raised by taxation, that the power of creating funded debts by the issue of bonds, if granted at all, should be exercised only for the purpose of meeting extraordinary emergencies, and that such debts when created should be paid and extinguished at maturity, thus restoring the normal and ordinary condition of paying expenses as they arise by the imposition and collection of taxes. Nearly all the state constitutions carefully limit the power of the legislature to issue bonds and define the purposes for which this power may be exercised. In some states, as in Wisconsin, the constitution prohibits the state from contracting public debts except for the purpose of defraying extraordinary expenditures. Many of the constitutions also direct that the law authorizing the creation of a public debt shall provide for levying a special annual tax sufficient to pay the interest on the debt and to provide a sinking fund for the payment of the principal at maturity within a specified number of years. Furthermore, in many of the states the constitutions direct the legislatures to raise revenues sufficient to defray the estimated expenses of the state or of the state government, and also sufficient sum to pay the interest on the state debt. There could not be a clearer indication that interest on the state debt was not regarded as an *expense* of the state government. Had it been deemed such an expense there would have been no need of requiring the legislature to raise revenue to pay

interest on the state debt in addition to revenue for the purpose of defraying the expenses of the state government.

We shall now quote the specific provisions from the state constitutions to which we have made general reference. In many of these provisions the phrase used is substantially the same as that in the Wheeling Ordinance; namely, the ordinary, or the current, or the necessary, expenses of the state government, and these expenses are expressly distinguished from interest on the state debt. When we find that so many constitutions, drawn up by men who were under a peculiar obligation to use language accurately, agree in separating the ordinary expenses of the state government from interest on the state debt, the inference is compelling that this distinction is generally accepted, and that the men who framed the Wheeling Ordinance, in charging the new state with a just proportion of the ordinary expenses of the state government, did not intend to include interest on the public debt of Virginia among these expenses.

(*i*) EXTRACTS FROM STATE CONSTITUTIONS.

Alabama, Constitution of 1875, Article X., Section 7, provides that the City of Mobile "may, until the 1st day of January, 1879, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed three-fourths of one per centum to pay the *expense of the city government*, and may *also* until the 1st day of January, 1879, levy a tax not to exceed the rate of one per centum, and from and after that time a tax not to exceed three-fourths of one per centum to pay the *existing indebtedness* of said city and *the interest thereon*."

Alabama, Constitution of 1901, Article XI., Paragraph 216, provides that the City of Mobile "may from and after the ratification of this constitution levy a tax not to exceed the rate of three-fourths of one per centum to pay *the expenses of the city government*, and may also levy a tax not to exceed three-fourths of one per centum to pay *the debt* existing on the 6th day of December, 1875, *with interest thereon*, or any renewal of such debt."

Florida, Constitution of 1885 (in force at present), Article IX., Section 2: "The legislature shall provide for raising revenue sufficient to defray *the expenses of the state* for each fiscal year, and *also* a sufficient sum to pay *the principal and interest of the existing indebtedness of the state*."

Georgia, Constitution of 1877 (in force), Article VII., Section 1: "The powers of taxation over the whole state shall be exercised by the general assembly for the following purposes only: For the support of the state government and the public institutions. * * * * To pay the interest on the public debt. To pay the principal of the public debt."

Section 14, Paragraph 1: "The general assembly shall raise by taxation each year, in addition to the sum required to pay the public expenses *and* interest on the public debt, the sum of $10,000 which shall be held as a sinking fund to pay off and retire the bonds of the state which have not yet matured."

Indiana, Constitution of 1851 (in force), Article X., Section 2: "All the revenues derived from the sale of any of the public works belonging to the state, and from the net annual income thereof, and any surplus that may, at any time, remain in the treasury derived from taxation for general state purposes, *after* the payment of *the ordinary expenses of the government, and* of the *interest* on bonds of the state, other than bank bonds, shall be annually applied, under the direction of the general assembly, to the payment of the principal of the public debt."

The ordinance relating to the state debt which was adopted as part of the Louisiana Constitution of 1879, reduced the interest payable on certain state bonds, fixing the rate from January 1st, 1880, at 2 per cent. for five years thereafter, and provided in article 3: "Be it further ordained, that the coupons of said consolidated bonds falling due the first day of January, 1880, be and the same is hereby remitted, and any *interest* taxes collected to meet said coupons are hereby *transferred* to defray *the expenses of the state government.*"

Michigan, Constitution of 1850 (in force), Article XIV., Section 1, provides that, "The legislature shall provide for an annual tax, sufficient with other resources, to pay the estimated *expenses of the state government,* the *interest of the state debt,* and such deficiency as may occur in the resources."

North Dakota Constitution, Article II., Section 174, provides that: "The legislative assembly shall provide for raising revenue sufficient to defray *the expenses of the state* for each year, not to exceed in any one year four mills on the dollar of the assessed valuation of all tax-

able property in the state, to be ascertained by the last assessment made for state and county purposes, and *also* a sufficient sum to pay *the interest on the state debt.*"

Ohio Constitution, Article XII., Section 4, provides that: "The general assembly shall provide for raising revenues sufficient to defray the *expenses of the state* for each year, and *also* a sufficient sum to pay the *interest on the state debt.*"

Oklahoma Constitution, Article X., Section 2, provides that: "The legislature shall provide by law for an annual tax sufficient, with other resources, to defray the estimated *ordinary expenses of the state,* for each fiscal year."

Section 4 provides that: "For the purpose of paying *the state debt,* if any, the legislature shall provide for levying a tax, annually, sufficient to pay the annual *interest and principal of such debt* within 25 years from the final passage of the law creating such debt."

Oregon, Constitution of 1857 (in force), Article IX., Section 2: "The legislative assembly shall provide for raising revenue sufficient to defray the *expenses of the state* for each fiscal year, and *also* a sufficient sum to pay the *interest on the state debt,* if there be any."

Pennsylvania, Constitution of 1838, Article XI. (added 1864), Sections 1, 2 and 3 provide for the creation of state debts. Section 4 provides for the creation of a sinking fund to pay the accruing interest and annually to reduce the principal of the state debt and then provides: "The said sinking fund may be increased from time to time by assigning to it any part of the taxes or other revenues of the state not required for the *ordinary and current expenses of government.*"

Pennsylvania, Constitution of 1873, Article IX., Section 11, is in substance the same as Section 4 of Article XI. of the preceding Constitution referred to above, and provides that: "Said sinking fund * * * shall be increased from time to time by assigning to it any part of the taxes or other revenues of the state not required for the ordinary and current expenses of government."

South Dakota Constitution, Article XI., Section 1, provides that: "The legislature shall provide for an annual tax sufficient to defray the estimated *ordinary expenses of the state* for each year, not to exceed in any one year two mills on each dollar of the assessed valua-

tion of all taxable property in the state, to be ascertained by the last assessment made for state and county purposes.

"And whenever it shall appear that such ordinary expenses shall exceed the income of the state for such year, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of such ensuing year. And for the purpose of paying *the public debt*, the legislature shall provide for levying a tax annually, sufficient to pay the *annual interest and the principal of such debt* within ten years from the final passage of the law creating the debt, provided that the annual tax for the payment of the interest and principal of the public debt shall not exceed in any one year two mills on each dollar of the assessed valuation of all taxable property in the state as ascertained by the last assessment made for the state and county purposes."

In the case of *In re Limitation of Taxation*, 3 S. D., 456, the court construed Section 1 of Article XI. of the Constitution as follows: "This section relates to three different and distinct items of taxation: First, the annual tax for defraying *the ordinary expenses* of the state; second, taxes to pay deficiencies from preceding years; third, taxation for the purpose of paying *the public debt.* * * * When the purpose is to pay the public debt, the legislature shall provide for levying an annual tax sufficient to pay the annual interest and the debt within ten years. The tax, *like the one* for the estimated ordinary expenses, is limited to two mills on the assessed valuation of property."

Texas Constitution, Article XI., Section 6, provides that: "Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed, and collected *separately* from that levied, assessed and collected for current expenses of municipal government, and shall when levied specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds or other indebtedness for the payment of which such tax may have been levied."

Virginia Constitution, Article XIII., Section 188, provides that:

"No other or greater amount of tax or revenue shall at any time be levied than may be required for the *necessary expenses* of the government, *or* to pay the *existing indebtedness* of the state."

Section 189 fixes the rates of state taxation on property, and provides that the proceeds "shall be applied to the expenses of the government *and* the indebtedness of the state."

Washington Constitution, Article VII., Section 1, provides that: "The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated *ordinary expenses* of the state for each fiscal year. And for the purpose of paying the *state debt*, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the *annual interest and principal of such debt* within twenty years from the final passage of the law creating the debt."

West Virginia Constitution, Article X., Section 4, provides that: "The payment of any liability other than that for the *ordinary expenses* of the state, shall be distributed over a period of at least twenty years."

Section 5 provides that: "The power of taxation of the legislature shall extend to provisions for the payment of the *state debt* and *interest* thereon, the support of free schools, *and* the payment of the annual estimated *expenses of the state.*"

(*j*) THE DISTINCTION BETWEEN ORDINARY EXPENSES OF GOVERNMENT AND INTEREST ON A PUBLIC DEBT IS APPARENT IN THE CASE OF MUNICIPAL CORPORATIONS.

The line of division between ordinary expenses of government and interest on a public debt is plainly marked in the case of municipal corporations. It is familiar law that a municipal corporation has no power to issue bonds without express authority from the legislature, and statutes giving such authority are strictly construed. It necessarily follows that a municipal corporation has no power to impose taxes for the purpose of paying bonds or interest thereon unless authority to issue the bonds was duly conferred. On the other hand, a municipal corporation, by virtue of its creation, has implied power to incur debts for the purpose of its existence and to raise money

by taxation to pay these living expenses. In *U. S. v. New Orleans*, 98 U. S. 381, 393, Mr. Justice Field, speaking for this Court, said: "When such (municipal) a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens: such as the opening and repairing of streets, the construction of side-walks, sewers and drains, the introduction of water, and the establishment of a fire and police department."

Is it not clear that the expenses, which municipal corporations have power to incur by necessary implication, are ordinary expenses of municipal governments as distinguished from those payments which are not necessary to their existence and grow out of obligations which depend for their validity on the express authorization of the legislature?

(*k*) THE ADJECTIVES "ORDINARY," "CURRENT" AND "NECESSARY" WHEN APPLIED TO GOVERNMENTAL EXPENSES ARE SYNONYMOUS.

The Master has pointed out that the expression considered by the courts in some cases is "ordinary expenses," while in others it is "current expenses," and in still others it is "necessary expenses." These different phrases also appear in the constitutional provisions which we have quoted. The Master rightly concludes that the courts treat the adjectives "ordinary" and "current" when applied to expenditures of a state or a municipality as synonymous (Master's Report, pages 91, 92). This Court, in considering the terms of a private trust, said: "We think the correct interpretation to the phrase 'current expenses' was given it by the Circuit Court, namely, ordinary expenses" (*Taylor* v. *Mayo*, 110 U. S. 330). The cases, furthermore, show that the expression "necessary expenses," when the context shows that regularly recurrent expenses of government are referred to, has

the same meaning as "ordinary expenses" and "current expenses." We submit that all these phrases describe the expenses which are incurred in carrying on the regular work of government. Judge Larton, in the case of *City of Cleveland* v. *U. S.*, 111 Fed Rep. 341, 350, defined current expenses as follows: "Those current expenses proper for the maintenance of the city government and chargeable against current revenue." In *Burch* v. *Earhart*, 7 Ore. 58, 66, Chief Justice Kellogg gave the following definition: "Current expenses of the state mean the ordinary running liabilities incurred by the state in the administration of its offices from year to year." In *Dunbar* v. *Board, etc.*, 5 Ida. 407, 412, 413, the court, referring to the ordinary expenses of a county, defined them as "Ordinary expenses such as are usual to the maintenance of a county government, the conduct of its necessary business, and the protection of its property."

(*l*) THE MASTER'S ARGUMENT.

The regular work of government to which the foregoing definitions refer differs according to the needs, the means and the demands of different communities. The Master's Report (page 87) states: "The defendant contends that the language should receive a construction which would make 'ordinary' synonymous with 'necessary' or 'essential' used in the sense of indispensable expenses—expenses which if not paid the wheels of government will cease to revolve, without the payment of which the state government cannot be administered." In one sense this is a correct statement of defendant's position, but not in the sense in which the Master apparently understands this statement. On page 92 of his report the Master says: "The defendant relies upon the line of cases where judgment creditors seeking to recover payments from the revenues of the municipality have been postponed to ordinary current or necessary expenses, which are made a primary charge upon revenues. The cases clearly establish the general doctrine. From some of them it might perhaps be inferred that interest was not a primary charge or an ordinary, current or necessary expense. I find none of them, however, where the specific question as to whether interest is or is not an 'ordinary expense' is concerned. It is very clear that all essential expenses are also 'ordinary expenses,' but it does not by any

means follow that all 'ordinary expenses' are essential expenses, that there may not be 'ordinary expenses' which are not essential expenses. If it were true that judgment creditors were postponed only to essential or indispensable expenses, the cases might be entitled to considerable significance. On the contrary, however, the postponing of judgment creditors is not confined to essential or indispensable expenses, as expenses which do not come within that class, are often held to be primary in their character and to precede judgment creditors as a charge upon the current revenues. The following cases show that such current or ordinary expenses as light, water and fire protection, none of which are essential to the revolution of the wheels of government, have been held to be ordinary or current expenses that will be made a charge upon the revenues prior to the claims of judgment creditors, thus demonstrating that the essential character of the expenditure is not the test of an ordinary expense.' "

(*m*) FALLACY OF THE MASTER'S ARGUMENT.

The Master's argument in substance appears to be this: He concedes that the payment of interest on a public debt is not an "essential expense," indispensable to carrying on the government, but he argues that because judgment creditors are postponed not only to essential expenses, but also to "ordinary expenses" which are not "essential," therefore the cases relating to judgment creditors do not decide that payment of interest on a public debt is not an ordinary expense. It would be a sufficient answer to point out that in some cases the judgments which were postponed to ordinary expenses were judgments for interest on a public debt. The fallacy of the Master's argument, however, lies in his assumption that he or a court can determine what is an indispensable or essential expense of a particular government. The true rule is that this is a matter to be determined by the government, and that the determination of the government cannot be reviewed by a court in the absence of clear abuse of discretion. The requirements of a highly developed state are different from those of a newly settled state. The essential expenses of a city like New York are in number and kind very unlike those of a town in a sparsely settled western state. There is no conflict in the cases if one bears in

mind this rule, that the judge of the necessity of expenses is the government itself. When this rule is borne in mind it is evident that the Master is wrong, and that there can be no ordinary expenses of government in the sense in which this phrase is used by the courts, which are not essential expenses. The rule as we have stated it has been established by the highest authorities. In *City of East St. Louis* v. *U. S.*, 110 U. S. 321, Mr. Justice Matthews, in delivering the opinion of the Court, said: "The question, what expenditures are proper and necessary for the municipal administration is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it." The same rule is also recognized and approved in the following cases:

White v. *Mayor*, 109 Ala. 476.
Mayor v. *State*, 32 La. Ann. 748, 749.
State ex rel. Lorenz v. *New Orleans*, 116 La. 851.
Sherman v. *Langham*, 92 Tex. 13.
Young v. *Lamb*, 43 Neb. 813.
State v. *Sheldon*, 52 Neb. 364.
Ward v. *Piper*, 69 Kan. 773.

(*n*) BY THE GREAT PREPONDERANCE OF JUDICIAL CONSTRUCTION INTEREST ON A PUBLIC DEBT IS NOT AN ORDINARY EXPENSE OF GOVERNMENT. THE AUTHORITIES.

The cases in which the question has arisen whether ordinary or current expenses of government include interest on a public debt are few. This we are persuaded is due to the general understanding as indicated by the constitutional provisions cited above, that interest on a public debt is not one of such ordinary expenses. The cases to which we shall now call the attention of the court, however, seem to us sufficient in number and weight to be decisive on this question.

In the case of *Quincy* v. *Jackson*, 113 U. S. 332, a creditor who had recovered a judgment upon coupons for interest on bonds which the City of Quincy had issued in payment of a subscription for stock of a railroad company, had petitioned for a writ of mandamus to compel the city to levy taxes for the payment of his judgment. The city was empowered by a law passed in 1863 to levy taxes not exceed-

ing fifty cents on each one hundred dollars ($100) of the assessed value of property "to pay the debts and meet the general expenses of said city." In 1869 the legislature passed the act authorizing the subscription for railroad stock in payment of which the city had issued the judgment creditor's bonds. The city contended that its power to tax was defined by the act of 1863, and that this power had been exhausted. The court, however, decided that the act of 1863 applied only to taxation for raising money to pay ordinary expenses, that the indebtedness arising on the bonds given for railroad subscriptions was not of this character, and the power to tax for the purpose of raising money to pay the bonds was implied in the grant of authority to issue the bonds in payment of the stock subscription. Mr. Justice Harlan, speaking for the Court, (page 336) said: "The act of 1863 related to debts and expenses incurred for ordinary municipal purposes and not to indebtedness arising from railroad subscriptions, the authority to make which is not implied from any general grant of municipal power, but must be expressly conferred by statute." Referring to the act of 1869, which authorized the city to subscribe for the railroad stock, Mr. Justice Harlan further said (page 337): "It could not have been contemplated that indebtedness thus created would be met by such taxation as was permitted for ordinary municipal purposes. In giving authority for such extraordinary indebtedness the legislature did not restrict its corporate authorities to the limit of the taxation provided for ordinary debts and expenses. The limitation imposed by the city's charter upon its power of taxation had reference to its ordinary municipal debts and expenses." This decision is in point. The judgment sought to be enforced was for interest on a public debt. The limited power of the city to tax for the purpose of meeting its ordinary expenses had been exhausted, and if the court had deemed interest on a public debt an ordinary expense the writ of mandamus must have been refused, but the Court held that the interest on this public debt was not an ordinary expense, and therefore, the limitation upon the city's power to tax for ordinary expenses did not apply.

In *Clay County* v. *McAleer,* 115 U. S. 616, the case arose on a petition for a writ of mandamus to compel Clay County to levy a sufficient tax to pay the petitioner's judgment. It appeared that the power of the county to levy for ordinary county revenue was limited to six

mills, and by demurrer to the answer it was admitted that the maximum levy would not be sufficient to pay the ordinary current expenses of the county, and that no part thereof could be applied for the payment of the petitioner's judgment without seriously impairing the efficiency of the county government. The Court held that no levy could be ordered to pay the relator's judgment, saying (page 618): "Here the answer shows affirmatively that the whole of the six mill levy of 1882 will not be sufficient to pay the ordinary expenses of the county."

East St. Louis v. *U. S.*, 110 U. S. 331, is to the same effect.

In *Sibley* v. *Mobile*, 3 Woods 535, 541, Judge Woods, referring to the bondholders who had recovered judgment against the city, said that they "are entitled to have all the taxing power of the city within the constitutional limit exercised, if necessary, to secure the performance of the contract made by the city with them. When that power is exercised the current expenses of the city must be paid out of the fund so raised, and out of the residue the relators are entitled to share *pro rata* with the other creditors of the city who have no specific lien or claim to any portion of the taxes."

Accord *Mayor, etc., of New Orleans* v. *U. S.*, 49 Fed. Rep. 40.

In the case of *Ward* v. *Piper*, 69 Kan. 773, a creditor who had obtained a judgment for interest on township bonds applied for a writ of mandamus to compel the officers of Isabel Township to pay his judgment. The plaintiff asked to have the fund which had been levied and collected to meet the general current expenses of the township applied to the payment of his judgment. This was denied by the court. Johnston, C. J., delivering the opinion, said (page 775): "It is not alleged nor shown that the funds raised for current expenses are more than sufficient for that purpose. It does not even appear that the indebtedness on which the judgment was founded was for an ordinary expense of the township to which funds derived from a levy for legal expenses could be legally applied. The taxes levied for one purpose cannot be diverted and applied to another. Presumably the township officers are acting in good faith, and have levied and raised a fund which is necessary as well as sufficient to meet the ordinary current expenses of the economical administration of the township. The township organization must be maintained, and its current ex-

penses met, although creditors of the township must wait for the payment of their bonds and judgments."

In *State ex rel. Watkins* v. *Macon County Court*, 68 Mo. 29, a creditor who had recovered judgment on bonds which the county had issued in payment of its subscription for stock in a railroad company, applied for a writ of mandamus to compel the county to pay his judgment out of its general fund. It appeared that the statute which authorized the county to issue bonds in payment of the subscription provided for a tax not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property in the county for the purpose of paying the interest on the bonds, but this special tax was insufficient to pay relator's judgment. The case arose on demurrer to the return which alleged that all of the general fund was needed to pay the current and necessary expenses of conducting the county government. The court refused to grant the writ of mandamus. Judge Norton, in the opinion of the court, which he delivered, said (page 42): "What, then, are the purposes for which the general expenditure or common fund of a county is raised? A proper answer to this question can only be returned by the law which authorizes a levy of taxes to produce it. That law is to be found in Wagner's Statutes, section 165, page 1193, and is as follows: 'The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for state purposes, * * * but the county tax shall in no case exceed one-half of one per cent.' The revenue derived from the tax thus authorized to be annually imposed, is in the very terms of the law declared to be to defray the expenses of the county, which we understand to mean the ordinary current expenses incurred in conducting the county government, such as the payment of grand and petit jurors, witnesses summoned before the grand jury, costs of criminal prosecutions, expenses in supporting the poor and insane of the county, salaries of officers, assessing and collecting the revenue, &c.

"That an extraordinary indebtedness incurred by a county in subscribing stock to a railroad corporation and in issuing bonds in payment was never intended by the general assembly to be embraced in the words 'expenses of the county,' or that they contemplated the creation

of any debt for county purposes is manifest from section 166, which makes it the duty of the county court, after the assessor's book has been adjusted and returned, 'to ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes so as to raise the required sum.' If section 165, *supra,* was intended to authorize the creation of debts or provide for their payment, the general assembly would, doubtless, have so expressed themselves as they did in sections 1 and 7, page 1158, of the same law in providing for the levy of state taxes. Section 1 provides that 'for' the support of the government of the state, the payment of the state debt, * * * taxes shall be levied on all property, real and personal,' * * * and section 7 provides that there shall annually be levied, assessed and collected on the assessed value of all the real and personal property subject to taxation in the state, one-fifth of one per cent. for state revenue, and one-fourth of one per cent. for the payment of all state indebtedness. The state revenue thus provided is in express terms for the support of the state goverment, and the county revenue provided for in section 165 is for the payment of the expenses of the county government.

> "That such an extraordinary indebtedness as is incurred by a county in issuing bonds in payment of a railroad subscription was not intended to be embraced in the terms 'expenses of the county,' is apparent when it is considered that the very same words used by the general assembly in section 165 are to be found in section 20, Revised Statutes 1825, page 671, except in the latter act, the tax authorized was limited to 50 per cent. of the amount of state tax. The same section was continued in the Revised Code of 1835, except that the amount of tax was in no case to exceed the amount of the state tax. It is also to be found in the Code of 1845, and that of 1855, the only difference being that in the former the rate of taxation was not to exceed 34 cents, and in the latter not to exceed 40 cents on a valuation of $100. It is clear that the general assembly in 1825 and in 1835, when they authorized the county courts to levy such tax from time to time as should be necessary for defraying county expenses, could have had no reference to such indebtedness as arises from a county bond issued in discharge of a subscription to

the stock of a railroad corporation, because, at that time, there was no law to be found on our statute books authorizing such subscriptions or the issuance of any such obligations."

Accord *State ex rel. Hudson* v. *Trammel*, 11 S. W. Rep. 747, Missouri.

City of Denison v. *Foster*, 37 S. W. Rep. 167, Texas.

Cromarty v. *Commissioners*, 85 N. C. 211, 87 N. C. 134.

In the foregoing cases creditors who had recovered judgments on claims for interest on municipal bonds were not allowed to take funds raised for the payment of the ordinary expenses of the municipalities when the funds were needed for this purpose. The decisions conclusively establish that interest on a public debt is not an ordinary expense of government; if it had been, the courts would have been bound to hold that funds devoted to the payment of ordinary expenses should be applied to the payment of such interest, but they held instead that the claims for interest must wait for payment until the ordinary expenses had been paid. The Master's report (page 108) protests that the cases of the judgment creditors are not directly in point, because the present case is not a controversy between a judgment creditor and a municipality; but surely the principle which governed the decisions by which the payment of judgments for interest on a public debt were postponed to the payment of ordinary expenses, is the same principle which must govern in the controversy between Virginia and West Virginia. The question here is the same as the question in these cases, namely, whether interest on a public debt is an ordinary expense of government. The cases cited above decided that it was not.

In *White* v. *Mayor*, 119 Ala. 476, the case arose on an application by the holder of a judgment based on coupons for interest on bonds of the town of Decatur for a writ of mandamus to compel the town to pay this judgment out of its general revenue. The court held that the petitioner was entitled to mandamus, applicable, however, only to the surplus of the town's revenues over its current expenses. McClellan, J., in delivering the opinion of the court, said, page 480: "It is thoroughly well settled law that where the interest and principal of a municipal bonded debt is payable out of the general revenue of the town, no part of such revenue that is necessary to meet current

legitimate municipal expenses can be subjected to the payment thereof, but only to the surplus of income after the governmental expenditures have been met or provided for can by any process of law be applied to such debt. *Dill* v. *Mun. Corp.,* Secs. 100, 101; *Underhill* v. *Calhoun,* 63 Ala. 216; *Williamsport* v. *Com.,* 190 Pa. St. 498; *East St. Louis* v. *U. S.,* 110 U. S. 321; *Com.* v. *Commission.* 1 Wharton 1. Nor can it make any difference that the bonded debt is specially charged upon the general revenues or that the corporate authorities are specially required to set apart a sufficiency of such revenues to meet such debt. * * * * with or in the absence of such provisions, it is within the power of and is the duty of municipal corporations * * * * to apply the whole revenues to current municipal expenses, leaving nothing to go in payment of bonded debts, nor can the courts determine what municipal expenditures are necessary. If a given expenditure is within charter authorization, and therefore abstractly considered a legitimate municipal charge, the courts cannot pass upon the advisability or wisdom of its being made or incurred."

In the case of *Anniston* v. *Hunt,* 140 Ala. 394, the charter of the City of Anniston required the city council before July 1st in each year to agree upon a budget of expenses for governmental purposes for the year ending on the 30th of the following June. In making up the budget for the year ending June 30th, 1903, the council had included among the expenses for government purposes an item of $7,600 for interest on bonds of the city. A judgment creditor of the city applied for a writ of mandmus commanding the mayor and councilmen to pay his judgment out of the surplus revenue of the city for the year ending June 30th, 1903, and restraining them from paying the interest on the bonds which had been included in the budget among the government expenses. If the revenues were not applied to the payment of this interest there would be a surplus to pay the petitioner's judgment. The writ of mandamus was granted and the Supreme Court affirmed the judgment of the court below. In delivering the opinion of the court, Haralson, J., said (p. 400): "We have found neither in the charter nor in any other statute any legislative authority to make the interest income on municipal bonds and accounts an item of expenditure for the administration of government purposes. The council, therefore, had no right to estimate this interest as a

government expense and by way of anticipation in their budget of expenses to appropriate the amount to the payment of interest on municipal bonds and accounts so as to defeat the plaintiff or other creditors in their efforts to subject this excess over necessary current expenditures to the satisfaction of their demands."

In *Leavitt* v. *Town of Somerville*, 75 Atlantic Rep. 54 (Maine, 1909), the question was whether certain bonds of the town were valid under the constitutional provision limiting the debt which the town could incur. The bonds in question, which exceeded in amount the limit of indebtedness, purported to refund a debt existing at the time when the constitutional limitation took effect. The amount of the bonds was larger than the original debt, but if the excess represented accumulated interest the bonds would be valid. The court, however, declared this fact had not been proved, saying (page 57): "There is no legitimate inference that the town officers paid current expenses any more than that they paid the interest on the town debt."

In *Dexter* v. *County Commissioners*, 20 Weekly Law Bulletin 364 (Hamilton County, Ohio, Common Pleas), it was held that the estimated levy which the statutes required the auditor to present to the county commissioners on or before the first Monday in April of each year, was intended to cover current expenses as distinguished from the payment of the bond liabilities of the county, and that the acts creating sinking funds for future payments of outstanding bonds did not contemplate the payment of debts and the accumulation of moneys for that purpose as among the current monthly or annual expenses of the county.

In the case of *University R. R. Co.* v. *Holden*, 63 N. C. 410, the Supreme Court of North Carolina had occasion to construe a provision of the recently adopted Constitution of 1868. This provision contained in Article 5, section 1 of the Constitution, is as follows:

> "The general assembly shall levy a capitation tax on every male inhabitant—which shall be equal, on each, to the tax on property valued at $300 in cash. * * * And the state and county capitation tax combined shall never exceed $2.00 on the head."

The question was whether this provision, requiring what the court called an equation of taxation between the property tax and the capi-

tation tax, applied to all taxes, or whether it was limited. The court gave the question most careful consideration, deeming it so important that each of the judges delivered a separate opinion. The conclusion of the judges was that the equation of taxation established by the provision which we have quoted did not apply to all taxes, but only to taxes imposed for the ordinary expenses of government, and the judges expressly declared that the equation of taxation did not apply to taxes imposed for the purpose of raising money to pay interest on a public debt.

Pearson, C. J., said (page 414):

> "I agree that if under this equation, carried to its limits, the amount is not enough to meet current expenses, and also to pay the interest on the public debt, then for the excess needed it is not only within the power, but it is the duty of the general assembly to disregard the equation."

Reade, J., said (page 418):

> "My construction of the tax power of the legislature under the constitution is as follows: (1) The first object of the convention in the fifth article of the constitution was to provide for the ordinary and current expenses of the government; that is done in sections 1, 2 and 3. And for that purpose the tax is limited to $2 on the poll, and the same amount on $300 worth of property, and the equation must be observed. This was thought to be sufficient for the ordinary and economical administration of the government. (2) We had a considerable public debt, and after providing for current expenses, the next consideration was, how is the public debt to be met? And the fourth section provides, that a special tax shall be laid for that."

Dick, J., said (page 432):

> "The object of the convention in article 5, section 1, was to provide a system of general taxation for the ordinary expenses of the government. * * * Sections 1, 2 and 3 establish a general revenue system for the state; and sections 4 and 5 provide special taxes for the state indebtedness, unexpected exigencies and for the completion of unfinished railroads."

Speaking in reference to Section 5, Article 5, of the Constitution, which authorizes the state to issue bonds for extraordinary purposes, Judge Dick said (page 433):

> "The convention evidently contemplated the necessity of incurring new debts outside of the ordinary expenses of the government."

Settle, J., said (page 436):

> "I conclude that the equation of taxation applies only to the ordinary expenses of the state government. It does not apply to the public debt."

The opinion of the judges in *University R. R. Co.* v. *Holden*, that the equation of taxation prescribed in Section 1, Article 5, of the North Carolina Constitution, applies only to taxes imposed for the payment of the ordinary expenses of government and does not apply to taxes imposed for payment of interest on a public debt, was affirmed after very careful consideration of the whole subject and a review of all the authorities in the recent case of *Southern Ry. Co.* v. *Board of Commissioners of Mecklenburg County*, 148 N. C. 220.

The case of *Union Pacific R. R. Co.* v. *U. S.*, 99 U. S. 402, though it relates to a private corporation, is, we submit, in point, because it decides that interest on a funded debt is not an ordinary expense. The question in the case was whether the Union Pacific Company was liable to account to the government for five per cent. of its net earnings under the sixth section of its charter, and the Court had to determine what was meant by the expression, "the net earnings of the road." Mr. Justice Bradley, who delivered the opinion of the Court, said:

> "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping

> up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair: whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. * * * All payments of interest on the bonded indebtedness of the company should be charged to capital interest account, and not to current expenditures. Though payable out of earnings before any dividend can be made to stockholders, they cannot be deducted for the purpose of ascertaining the 'net earnings' of the road, as that term is to be understood in the sixth section of the act. The bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock; and the interest accruing thereon is in the nature of a dividend on such capital. It has nothing to do with and cannot affect the amount of the net earnings of the road."

(*o*) LEGISLATION OF VIRGINIA DURING THE PERIOD COVERED BY THE ORDINANCE DID NOT DEAL WITH INTEREST ON THE PUBLIC DEBT AS AN ORDINARY EXPENSE OF GOVERNMENT.

The legislature of Virginia, in its appropriations, from 1823, did not deal with the interest on the internal improvement debt as one of the items constituting the ordinary expenses of the state government. The fiscal year of the state began on the first day of October of each year. The annual appropriation bill constituted a general fund of the taxes and arrears of taxes due on the first day of October, last preceding, not otherwise appropriated, and all other branches of revenue not appropriated by law, which shall come into the public treasury prior to the succeeding October and the surplus of all appropriations theretofore made, shall constitute a general fund, and be appropriated in specific sums, as follows, to-wit:

To the expense of the general assembly; to the salaries and allowances of the officers of the civil government; to the commissioners of the revenue, for examining commissioners' books; to defray criminal charges, including the expense of guarding jails; for pensions, civil contingent fund, militia establishment, including the services of clerks

of courts-martial, of adjutants, provost marshals, and expenses, and for the purchase of drums, fifes, and to pay for instruments where the fines of the regiment are insufficient, pay of the adjutant and inspectors; internal charges of the penitentiary, house and officers' salaries and the transportation of criminals to the penitentiary, such balance of former appropriations to complete penitentiaries; public guard in the city of Richmond; slaves executed or transported; expense of representation to congress and state senate; public warehouses, including the pay of superintendents, civil prosecutions, including clerks and sheriffs' fees; services of guard at Lexington arsenal; for the collection and transportation of arms; to constitute the balance of military contingent fund, including claims for services during the last war; transportation of public arms; defray expense of publishing the map of Virginia; complete erection of Western Lunatic Hospital; support of lunatic hospital at Williamsburg; transportation and expenses of lunatics confined in jail, etc.—all ordinary expenses of the state government.

In addition, the legislature made specific appropriation to pay the interest on $319,000 of the seven per cent. debt, and on two certificates of six per cent. debt held by the literary fund, $23,773. This appeared to be the *general debt* outstanding. These bonds, held by the literary fund, were owned by the state; and this was simply the measure of annual appropriation to that fund, for purposes of convenience, such as has been frequently resorted to by other states.

The second section provides that so much of the public revenues, and of other public moneys *not otherwise appropriated by law* as may be received into the treasury after the thirtieth day of September, next, and the surplus of all other appropriations heretofore made, shall constitute a general fund to defray such expenses authorized by law as are not therein specifically provided for; and to defray the current and other expenses of the commonwealth in the fiscal year commencing on the first day of October, next, and terminating on the 30th day of September, 1828 (this was the act of 1827); and the auditor of public accounts is authorized and required to issue his warrants in the same manner as if the funds had been specifically mentioned, with such exceptions, etc. This was the act passed March 8, 1827; and those which had preceded it, from 1822, did not differ.

As early as 1840, in none of these appropriation bills was interest appropriated for the payment of bonds issued for internal improvements.

As early as 1840 the annual appropriation bill changed in respect of the provision as to interest. It created, as did its predecessors, a general fund constituted of the taxes and arrears of taxes due to the preceding October, and not otherwise appropriated, and all other branches of revenue not appropriated by law which should come into the treasury prior to the succeeding October, and the surplus of all other appropriations.

Out of this fund were appropriated expenses of the general assembly, officers of the civil government, commissioners and clerks, criminal charges, and items similar to those mentioned in the act of 1827.

And it provided expressly and specifically for interest on the public debt as follows:

To pay the interest on certain certificates of public debt, to-wit:

For one year on seven per cent. debt, due literary fund, $22,330;

Half year's interest on same, unpaid on October 1st last and chargeable on present fiscal year, $11,165;

(This did not default the state, for she had the bonds on which she had omitted to pay interest to the literary fund.)

One year's interest on 6 per cent. debt, held by literary fund, $1,442.35;

One year's interest on $250,000 of 5 per cent. stock subscribed to the Chesapeake and Ohio Canal Company guaranteed by the act of February 18, 1833, $12,500;

One year's interest on $298,700, certificates issued for money borrowed to pay commonwealth's subscription to the stock of the Exchange Bank, $19,922;

Ten months' interest on $62,825, additional sum borrowed to pay commonwealth's subscription to stock of Exchange Bank, $3,143.23;

One year's interest on $80,592, certificates issued for money borrowed to pay commonwealth's subscription to stock of the Northwestern Bank, $5,315.52;

and then, after appropriating for contingent expenses of courts, pensions, civil contingent fund, militia, public guards, slaves transported,

representation to congress and the state senate, warehouses, civil prosecutions, arms, military contingent fund, removal of lunatics in jails, vaccine agents, roads, military school, electors, clerks of committees, sweepers of the capitol, principal engineer, etc., etc.

Section 3 provides that so much of the public revenue and all other moneys not otherwise appropriated by law as may be received into the public treasury, after the 30th day of September, next, and the surplus of all other appropriations heretofore made, shall constitute a general fund to defray expenses authorized by law which are not herein particularly provided for, and to defray the current and other expenses of the commonwealth in the fiscal year which will commence on the first day of October, next, and terminate on the 30th day of September, 1842; and the auditor of public accounts is hereby authorized and required to issue his warrants in the same manner as if the sums had been specifically mentioned, subject to such conditions, exceptions, and limitations, as the general assembly may prescribe by law.

Then comes an additional section, which was continued in each appropriation act until after the establishment of the sinking fund for the payment of interest and principal on the public debt, provided for by the constitution of 1850. It will be remembered that the stock for which the commonwealth subscribed, and the dividends thereon, were, in each instance, pledged, primarily, together with the improvement fund, not otherwise appropriated. It enacted, further, that if the revenue of the fund for internal improvement shall, at any time, be insufficient to meet the payments of the interest charge on such fund as it shall become due upon loans obtained for purposes of internal improvement, under existing or future acts, of the general assembly, such interest *shall be paid out of any money in the Treasury not otherwise appropriated;* and the auditor of public accounts is hereby authorized and required, upon the receipt of the order or orders of the board of public works, certifying the fact of such insufficiency in the funds of said board, to issue his warrant or warrants in their favor for the necessary sum or sums which shall be deposited in the treasury to the credit of the fund for internal improvement, to be applied by the said board on the warrants of the second auditor towards the payment of such interest.

Here, it will be noticed, interest on the internal improvement loans,

perhaps as a reason why specific appropriations were not made in any year to pay the interest on internal improvement loans, is that by law the primary security for such loans was the stocks and dividends derived from the stocks, and the internal improvement fund, which, if taken together, were inadequate, were supplemented by the pledge of the commonwealth to raise the money otherwise necessary to pay the interest and the principal as it matured. By this provision, it is seen that the interest on the internal improvement fund, where the special security proved inadequate, was to be paid out of money deposited to the credit of the internal improvement fund; not, by the act, otherwise appropriated. In other words, the payment of interest on internal improvement loans was deferred to all appropriations for the ordinary expenses of the government, whether specifically made, or generally appropriated, by Section 3 above quoted. And that provision was the last section of every appropriation act from 1840 to the time the sinking fund was established. Twenty million dollars of this debt was incurred between 1850 and 1861, after the sinking fund for the payment of interest and principal had been created.

(*p*) THE CREATION OF A SINKING FUND FOR THE PAYMENT OF INTEREST ON THE VIRGINIA DEBT SHOWS IT WAS NOT AN ORDINARY EXPENSE OF THE STATE GOVERNMENT.

The very fact of the creation of a sinking fund for the payment of interest on the public debt differentiates it from ordinary expenses of the state government.

Whoever heard of the payment of the ordinary expenses of a state government out of a sinking fund?

Section 29 of Article IV. of the Constitution of 1850, sets apart annually, from the accruing revenues, a sum equal to seven per centum of the state debt, as existing on the first day of January, 1862, to be called "The Sinking Fund," and applied to the payment of the interest on the state debt and the principal or such part as may be redeemable. If no part be redeemable, then the sum so remaining shall be invested in the bonds or certificates of debt of this commonwealth, or of the United States, or of some of the states of this Union, and applied to the payment of the state debt as it shall become redeemable. And

it made subject to this provision all debts contracted by the commonwealth thereafter.

It added this provision:

> "The general assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

If there were a deficiency in the treasury, because of an underestimate of the revenue, or of the expenses of the government, resort could not be had, for its payment, to the sinking fund. That one fund could be resorted to only for a purpose other than that for which it was created and set apart, in case of war, insurrection or invasion.

The creation of a sinking fund, which is so common in all the constitutions, and has been for a great many years in most constitutions, marks, in an illuminating way, the distinction between the ordinary expenses of a state government and the interest to accrue upon the public debt.

The ordinary annual expenses of the state government are estimated for. They change. Some times they exceed the estimate; and there is a deficit, although, by the Federal government, that has been prohibited by law, as has been done by the constitutions of some of the states. It is true that ordinary expenses are estimated for by county governments and other municipalities, even towns and villages. Speaking in respect of governments, sometimes additional offices are created; some times departments or bureaus, which have long existed, have, in legislative judgment, become unnecessary, and they are disposed of, and their duties transferred to some other department, or altogether pretermitted. But who ever heard of estimating the interest on the public debt? That does not fluctuate. It may be enlarged by the increase of debt, or diminished by payment of debt; but it is always susceptible of accurate ascertainment. It is fixed. In corporate management, it is characterized as a "fixed charge," as contradistinguished from ordinary expenses.

The ordinary expenses of the government, changing from time to time, must continue as long as the government lasts. The interest on the public debt continues as long as the debt lasts.

The philological distinction as to the difference between the expenses

of the government—ordinary, essential and necessary—confuses; but does not enlighten. They come to the same thing in the end.

(q) THE WORDS OF THE ORDINANCE SHOULD BE CONSTRUED IN THE LIGHT OF THE SURROUNDING CIRCUMSTANCES.

This Court, said, in *Sand Filtration Corporation* v. *Cowardin*, 213 U. S., page 364:

> "The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made."

This is a succinct and clear definition. It must be remembered, in reading the ordinance, that, at the time it was drafted and adopted, the debt of the Commonwealth of Virginia was about $33,000,000, the proceeds of which she had either expended directly for internal improvements or had invested in bank stocks, the stocks of railway companies, navigation companies, turnpike companies and bridge companies. The improvements constructed by the use of this borrowed money were almost all within the present limits of Virginia, and this was well known to the men who drafted and adopted this ordinance. These stocks were thought by Virginia to be of value, for, in her constitution of 1850, section 30, article IV., it was provided:

> "The general assembly may, from time to time, direct a sale of the stocks held by the commonwealth in internal improvement and other companies, and the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund, and be applied in like manner."

Can it be supposed that the men who framed and adopted this ordinance would have been willing to stipulate that the proposed new state should take upon herself the payment not only of a just proportion of the ordinary expenses of the state government, but a proportion of the $18,000,000 of interest upon the moneys borrowed by the Commonwealth of Virginia from 1823 to 1861, and invested in $30,000,000 of stocks, bank and otherwise, incorporations whose

improvements lay almost entirely within her limits, would remain within her limits, and which investments she was to keep? It is inconceivable.

To say that when she incurred this indebtedness, which is the sum of a great number of special loans, each with a special security, and invested the same in stocks, she did not expect them to be valuable and revenue-producing, not simply during the duration of the debt, but long after the debt should have been paid, would be to impeach her honor in the earlier, if not better days, of her existence, for she held out these stocks and dividends as the primary security of the money she borrowed, with which to repay it.

She became a great battlefield and the camping ground of contending armies; and if the ravages of war destroyed, in large measure, these improvements, and disappointed the expectation with which she had invested her money, it cannot be said that that unfortunate result is, in any wise, imputable to West Virginia, or her people.

It is not a complicated question. The words "ordinary expenses of the state government" are words of common use, and they are without technical signification. It seems to us impossible to misunderstand them.

The ruling of the Master seems to have been unconsciously, and with perfect good faith, based somewhat upon what seemed to him to be the equitable construction which he advocates in his report. If the words "ordinary expenses of the state government," as a matter of law, include interest on the public debt, he is right. If they do not, whatever may be the result of their exclusion from the computation, he is wrong, for it is a question of law. Whatever it means, as here used, it means wherever it is used.

(*r*) THE PROPORTION OF ORDINARY EXPENSES WITH WHICH WEST VIRGINIA IS TO BE CHARGED SHOULD BE ASCERTAINED UPON THE BASIS OF TAXABLE VALUES.

Whichever view this Court may adopt as to the meaning of the phrase, "A just proportion of the ordinary expenses of the state government," the question confronts it, upon what basis or standard are these expenses to be apportioned?

First: On the basis of area; or

Second: Upon the basis of population, and if so, shall slaves be included or excluded? or

Third: Shall it be upon the basis of population of 1823 of Virginia, as shown by the census of the United States, the average population to be taken as required by the decree; or shall it consist of five averages of ten-year periods combined, as taken by the Master; or

Fourth: Shall it be upon the basis of the assessed valuation of the real and personal property of Virginia and West Virginia?

Fifth: If so, shall it be based upon the valuation of January 1st, 1861, or June 23rd, 1863?

The joint schedules returned by the Master furnish a basis in accordance with the several alternatives.

We feel constrained to the opinion that the true basis is taxable values, or the average revenues for a period prior to the 1st of January, 1861. We formerly inclined to the opinion that population was the best basis. We see no reason, however, for the adoption of a basis upon which the ordinary expenses are to be apportioned which differs from the international law basis of general indebtedness, which we have somewhat discussed. A peculiar complication arises here with reference to the ascertainment upon the basis of population; and that is, the large number of slaves within the limits of Virginia and the relatively small number within that portion of Virginia which now constitutes West Virginia. Those slaves were property, albeit, as we have shown, they constituted a property upon which was levied a tax entirely disproportionate to their market value. They were the subjects of barter and sale the same as any other private property in the commonwealth was subject to it. They were taken care of by their masters. They were, of course, not given the privileges of white children in respect of common education. They did not enter into the basis of representation; and, therefore, neither paid taxes, nor contributed to the school fund, nor derived benefit from it. Even in the emancipation of slaves by the constitution, and free negroes, section 19 of article "IV." of the Constitution of 1859 provided that:

> "Slaves hereafter emancipated shall forfeit their freedom by remaining in the commonwealth more than twelve months after they become actually free, and

shall be reduced to slavery under such regulations as may be prescribed by law."

Section 20:

"The general assembly may impose such restrictions and conditions as they shall deem proper on the power of slave owners to emancipate their slaves; and may pass laws for the relief of the commonwealth from the free negro population, by removal or otherwise."

Section 21:

"The general assembly shall not emancipate any slave, or the descendant of any slave, either before or after the birth of such descendant."

Section 22:

"Taxation shall be equal and uniform throughout the commonwealth, and all property other than slaves shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law."

Section 23:

"Every slave who has attained the age of twelve years shall be assessed with a tax equal to and not exceeding that assessed on land of the value of three hundred dollars. Slaves under that age shall not be subject to taxation; and *other* taxable property may be exempted from taxation by vote of a majority of the whole number of members elected to each house of the general assembly."

Section 24:

"A capitation tax, equal to the tax assessed on land of the value of two hundred dollars, shall be levied on every white male inhabitant who has attained the age of twenty-one years; and one equal moiety of the capitation tax upon white persons shall be applied to the purposes of education in primary and free schools; but nothing herein contained shall prevent exemptions of taxable polls in cases of bodily infirmity."

It seems quite impossible that slaves should be included in the population. The taxes upon them were assessed to their owners. It seems impossible that in such a situation slaves should be considered

as part of the population for any purpose. Their value, as property, would, of course, enter into any calculation based upon the taxable values, or assessed value, of the separate portions of the state. And as we have already shown to the Court, the population as a basis of apportionment of debt between nations, is rejected. It has also appeared that area, or territory, is rejected as a basis for the apportionment of state debts. Capitation taxes were levied by Virginia under the constitution of 1850. During the whole period from 1823, the revenues of the state, aside from those which went into the internal improvement fund, were derived from the taxation of lands, inheritance, taxes on incomes, salaries and licenses, and almost every imaginable excise tax, including the taxation of land and personal property, as well as watches, clocks, plate, carriages and the like, and interest on the state's own securities, and excises of every imaginable description. The basis upon which the moneys were collected for the payment of ordinary expenses during these years would seem to be the basis upon which they should be apportioned between the two states.

West Virginia is not Bound to Pay Interest from January 1, 1861, on the Proportion of the Old Virginia Debt Assumed by Her.

1. NEITHER BY THE ORDINANCE NOR BY HER CONSTITUTION DID WEST VIRGINIA IN PRAESENTI ASSUME ANY PORTION OF THE PUBLIC DEBT OF VIRGINIA.

By the ordinance West Virginia *was* to take upon herself a "just proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, to be *ascertained*," etc. We may here inquire what is meant by the words "to *be ascertained*"? There can be but one answer to this question, and that is, the just proportion of the public debt of the Comonwealth of Virginia prior to January 1, 1861, which West Virginia was to take upon herself. How was this just proportion to be ascertained? First, by charging to it all state expenditures within the limits thereof; second, a just proportion of the ordinary expenses of the state government since any part of the said debt was contracted; and, third, deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period.

The ordinance did not become a compact between the two States of Virginia and West Virginia, nor did section 8 of Article VIII. of the Constitution become a compact between the two states at the time of their adoption, for there was then but one state and that was the Commonwealth of Virginia. When she consented and the congress of the United States admitted West Virginia into the union, there was an agreement between two states, and for the first time efficacy was given to section 9 of the ordinance and section 8 of Article VIII. of the Constitution. Before that they rested entirely in proposition.

When they became effective, they became effective as a compact between two states, one older than the other, but of no greater dignity or sovereignty; for West Virginia was admitted into the union, as all states must be admitted, on terms of equality with the original states. It is not conceivable that any state shall be dissimilar or unequal in dignity and sovereignty to the other states. If section 8 of article VIII. is to be read in connection with the ordinance, then the compact created the assumption, which was *in futuro*, and left yet to be ascertained, as we have argued, what was the just proportion of the debt which West Virginia agreed to assume or, what is precisely legally equivalent, to take upon herself? It was an unliquidated account. She did not assume the payment of any of the bonds or obligations of Virginia outstanding prior to January 1, 1861. The amount that she was to assume was, if the ordinance was in effect for any purpose, the amount ascertained by the methods prescribed by the ordinance. If it is not in effect, then the method is left to the legislature to choose and to execute.

The word "thereof" in section 8 of Article VIII. of the Constitution of West Virginia does not bear the construction for which counsel for Virginia contend, nor does the rule of law established in Virginia prior to 1863, that in private contracts "interest follows the principal as the shadow does the substance" apply to this case. The decisions which laid down that rule were all with reference to interest between individuals on private obligations.

2. THE VIRGINIA RULE AS TO PRIVATE CONTRACTS THAT INTEREST FOLLOWS THE PRINCIPLE DOES NOT APPLY TO CONTRACTS BETWEEN STATES.

But for the dignity and character of the eminent gentlemen who urge it, it is difficult to regard as serious the proposition that because among private parties in Virginia prior to the admission of West Virginia as a state "the interest follows the principal as the shadow does the substance" or, differently stated, because interest is an incident to the debt, or is favored both by the legislative and judicial bodies of the state, and because the laws of the old state, until changed, were adopted in the new as to private parties, that, therefore, by the contract between the sovereign State of Virginia and the sovereign State of West Virginia, a case for which the law of neither state made provision, West Virginia would be liable to pay all the unpaid interest on her proportion, when ascertained, of the debt existing January 1, 1861. No such intention can be imputed to the framers of the ordinance, nor the convention which adopted the Constitution of West Virginia.

The learned counsel appear to be conscious of the inapplicability of the rule which they assert as to interest on private contracts; and to show that it is the rule that the commonwealth pays interest on claims against her, they cite the case of *Higginbotham's Executrix v. Commonwealth*, 25 Grattan 627. That case was decided in 1875, and if it is authority for the statement that in 1875 interest, by the law of Virginia, was allowed against the commonwealth without any promise to pay interest, but as a mere incident to a debt, it cannot apply in this case. The question would be, what was the law of Virginia in respect of the liability for interest upon claims against her in the absence of contract in 1861, when the ordinance was adopted and when the constitution of West Virginia was adopted.

3. ANALYSIS OF HIGGINBOTHAM'S EXECUTRIX V. COMMONWEALTH.

It is notable that in the *Higginbotham case* the question of interest was not discussed, although many other questions were discussed. The syllabus of the case is as follows:

> "1. The present State of Virginia is bound to the creditors of the state for the debts due before the divi-

> sion for the whole of their debts. And West Virginia is equally bound for them."

That is a decision which hardly binds West Virginia, for she was not a party.

> "2. Under the statute, the State of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated."

The plaintiff in error, and petitioner below, was the executrix of David Higginbotham, deceased, who was the owner of twelve shares of stock in the old James River Company.. By an amendment to the charter of that company, passed on the 17th day of February, 1820, and accepted by the company, the company became the agent of the state to carry on the work for the state, and under the direction and the control of the general assembly; and it was agreed between the state and the company that, in lieu of the annual dividends which might have been thereafter declared on the stock, the company should be allowed twelve per centum per annum on its stock for twelve years from the commencement of the amendatory act, and fifteen per centum per annum thereafter forever. The act was declared on its face to be "a compact" between "this commonwealth and the said company, subject, however, at all times, to such change and modification as the legislature may think proper to make; provided that no such change or modification shall be made as will take from the James River Company their right to the dividends, or any part of the dividends, upon their stock allowed to them by this act." It was a solemn compact between the state and the company that "the dividend or annuity, as it is in effect, should be forever paid without abatement or diminution." Such was the solemn obligation assumed by the state as the price of the stockholders' property.

By an act of February 17, 1820, and other acts, the powers and duties of the James River Company, acting for the state, were from time to time extended and enlarged; but the company up to the last mentioned date, continued to exist under its own organization. On that day, however, a new company, with greatly extended powers, was chartered, called the James River and Kanawha Company, to which all the interest of the state in the old James River Company was transferred; but this transfer was made expressly "subject to the

payment of fifteen per centum per annum forever to the *stockholders of the old company.*" By this act the James River and Kanawha Company became the successor of the old James River Company, and the duty of providing forever for the dividend, as it is called, of fifteen per centum per annum to the stockholders of the old company devolved, as we have seen, directly on the James River and Kanawha Company, under its agreement with the state; and by the act of March 22, 1836, the state required the latter company to pay these dividends into the public treasury, to be disbursed among the stockholders of the old James River Company by the second auditor; thus again solemnly acknowledging the right of the stockholders to these "dividends," and the duty of the state to see that they were punctually paid, by requiring her assignee to pay them into the public treasury to be disbursed to the stockholders by a state officer.

Now, this was treated by the court as a solemn compact, the obligation of which on the state should be "eternal." The court says:

> "Accordingly we find that under all the changes of legislation on the subject down to the first of January, 1865, the appellant's annuity was regularly paid; but since that date there has been but a single payment of $120, leaving arrearages to the amount of $2,220, as of the first of July, 1871. For that amount *with its accruing interest*, after applying for payment at the offices of the auditor of public accounts, and the second auditor, and being refused at both, this suit was brought."

The petition was dismissed below.

It was claimed by the attorney general of Virginia that the dismemberment of the State of Virginia and the formation of a new state, called West Virginia, out of a portion of her territory, had discharged the State of Virginia from this debt as now claimed; that the old debt of Virginia contracted prior to her dismemberment, if not wholly extinguished by the events leading to, attending and following her dismemberment, was not then due from her, but only ratably from the two states. The court say:

> "Were this a question between the two states alone, I should not question the concluding part of the proposition;"

and quote from Puffendorf:

> "When a kingdom divides by common consent into two or more distinct commonwealths, the public patrimony, with all the debts and encumbrances upon them, ought to be equally shared among them."

The court decided that, in its opinion, Virginia was liable to pay the petitioner the amount of her demand, with interest, but the court said, in so deciding:

> "No power is claimed for this court to control or in manner to interfere with the discretion of the legislature in making provision for the payment of this debt. * * * The judgment being for more than three hundred dollars, the court has no authority to require the auditor of public accounts to issue his warrant for the amount. In such cases, the provision to be made for the judgment is expressly reserved to legislative discretion, and to that discretion we must leave it."

It must be noted, in respect of this claim, and it is rather exceptional, that when the state took the property, it was agreed between the state and the old James River Company that, in lieu of the annual dividends which might have been thereafter declared, the company should be allowed twelve per centum per annum on the stock for twelve years from the commencement of the amendatory act, and fifteen per centum per annum thereafter forever. That was a liability from the state to the company in exchange for its property. By subsequent arrangement, all the interest of the state in the old James River Company was transferred to the James River and Kanawha Company, subject to the payment of fifteen per centum per annum forever to the *stockholders* of the old company. By this act the James River and Kanawha Company became the successors of the old James River Company, and the duty of providing forever for the dividend, as it is called, of fifteen per centum per annum to the *stockholders* of the old company devolved directly on the James River and Kanawha Company under its agreement with the state.

This created the relation of debtor and creditor between the James River stockholders and the James River and Kanawha Company. When the commonwealth compelled the company to pay the dividend

monies into her treasury for distribution by her among the stockholders, she made herself a trustee of the latter, had no right to withhold or use the trust fund, and having failed to pay it over was bound in equity for interest upon it, just as the company would have been liable for interest, if the commonwealth had not interfered and the company had failed to pay the dividend.

This case cited by counsel is a long way from establishing the proposition, that even in 1875, thirteen years after the transactions involved here, it was the rule in Virginia for the state to allow interest upon claims against her.

When a state takes upon herself a trust she should stand like any other trustee, and the principle that a trustee can take no profit out of the trust estate applies universally.

4. THE CASE OF UNITED STATES V. NORTH CAROLINA.

The learned counsel refer to the case of the *United States* v. *North Carolina*, 136 U. S. 211. This was an action of debt brought in this Court, November 5, 1889, by the United States against North Carolina upon 147 bonds, duly executed, for $1,000 each, payable in thirty years from date, with interest at the yearly rate of six per cent., alleged in the declaration to be payable half yearly until payment of the principal. They were executed at different dates, set forth in the statement of the case. They were interest bearing debts. The declaration alleged that, at the dates when the bonds became payable payment of the principal was demanded by the United States and refused by the State of North Carolina. The defendant pleaded payment of the principal sums of the bonds after they became payable, together with all interest accrued thereon to the days when they became payable. The Court say:

> "The only question presented for our decision is whether, as a matter of law, the principal of the bonds bore interest after maturity."

And they add:

> "Interest, when not stipulated for by contract, or authority by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled: and,

> as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers;"

citing:

> *United States* v. *Sherman*, 98 U. S. 565.
> *Angarica* v. *Bayard*, 127 U. S. 251, 260.

The Court looked into the laws of North Carolina, and after stating the law as to the payment of interest in an action, against a private person and citing authorities, said:

> "But it is equally well settled, by judgments of the Supreme Court of North Carolina, that the state, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid."

5. THERE IS NO BASIS FOR VIRGINIA'S CLAIM FOR INTEREST.

No statute of Virginia has been cited by the learned counsel, who would have cited it, we think, if there had been such, by which the state subjects itself to the payment of interest as an incident to a debt, or by way of compensation for its use, or damages for non-payment of the principal when due. Whether the legislature in the *Higginbotham case* appropriated the interest, the counsel do not state. The opinion of the Supreme Court of the state that it ought to do so does not make it the rule of the state, nor do legislative acts in special and sporadic cases which allow interest on claims constitute a rule which binds the state to pay interest upon claims against it.

Moreover, Virginia is the state *demanding interest*. If one sovereign makes it a rule to pay interest on claims against it without having contracted so to do; in other words, puts itself upon the same plane as private creditors may be placed by its laws, does it follow that, because it pays interest itself without having agreed to do it, that it may collect interest from another sovereign which does not pay interest except where it has contracted to do so? The United States does not pay interest except where it contracts to pay it.

We have found no indication in the decisions of the Supreme Court

of Virginia that any such rule has been adopted by the legislature of that state, or by the courts of that state, if indeed the courts can make such a rule for a state. It is a matter of contract, and contracts are not made by the courts for states or their citizens.

Virginia has given very liberal right to her citizens to sue; but it is a suit for liquidation. The court has no power, except in petty claims, amounting to not over $300, to direct the auditor to issue a warrant, and the whole matter of payment, including the principal sum awarded, with or without interest, is left entirely to the discretion of the legislature. Probably, sometimes, they pay interest, and oftener they do not, as the case may or may not appeal to the legislative judgment. But there is no statutory rule for the payment of interest by the state on claims against her where she has not contracted to pay it.

In 1837, the question arose in the Court of Appeals of Virginia in the case of *Commonwealth* v. *Marston's Administrator*, 9 Leigh, page 36. To that case, there is appended a note, as follows:

> "There was an error committed by the reporter, in the report of *Lilly's* case, 1 Leigh 525, 6. It is there stated, that the circuit court of *Henrico* reversed the auditor's decision, and ordered him to issue a warrant in favor of *Lilly's* administrator, *for the amount of five years full pay, with interest from the 22d April, 1873;* and that that judgment was affirmed. But, in fact, the circuit court gave judgment, *not* for the *commutation*, but for the *half pay* that accrued to *Lilly* during his life, without interest; and that was the judgment which this court affirmed. This court expressly decided, that no *interest* should be paid; see judge *Green's* opinion, in the same case, *Id.* 538, and in *Markham's* case, *Id.* 523, 4."

6. WEST VIRGINIA AGREED TO ASSUME A JUST PROPOSITION, NOT OF THE OUTSTANDING OBLIGATIONS OF VIRGINIA, BUT OF HER DEBT.

It is clear that the constitution can bear no such construction as is sought to be placed upon it. It must be borne in mind that neither by the ordinance nor by the constitution was there any agreement to assume, or an assumption of, any proportion of the obligations of the

Commonwealth of Virginia outstanding prior to 1862. If she had agreed to assume a just proportion of the obligations of the commonwealth, it might be argued that, as they were interest-bearing obligations, she assumed to pay the principal and accruing interest, until paid; but the bonds or state stock, as evidences of debt, are one thing. The debt is another, and different thing. Moreover, it seems impossible to impute an intention, upon the part of the framers of the two instruments, that the new state should assume a proportion of the outstanding interest-bearing securities of the old state, January 1, 1861. For that day, it was an enormous debt. The framers of those instruments were well aware, as were the people in the Trans-Allenghany territory, that the moneys borrowed by the state had been expended in payment of stock subscriptions in corporations created to construct various internal improvements. It is conceivable that it could have been intended by the convention which framed either the ordinance or the constitution that the new state should assume, considering the character of the debt, the purposes for which it was contracted, the territory within which it had been expended, from 1823 to 1861, a proportion of the obligations representing the debt, and especially in view of the fact that the people of what now constitutes West Virginia had been, during a large portion of the period, deeply resentful that they were taxed to pay interest upon such indebtedness, so little of the proceeds of which was expended within their territory, and enured to their benefit?

7. THERE IS NO EVIDENCE THAT THE IMPROVEMENTS CONSTRUCTED BY VIRGINIA WITHIN HER PRESENT LIMITS WERE FOR THE BENEFIT OF THE REGION NOW WEST VIRGINIA.

It is alleged in the bill that these expenditures were largely with a view to the ultimate benefit of West Virginia, and to secure the development of her resources and the prosperity of her people. This is alleged in general terms. If this allegation is susceptible of proof, no proof has been offered. If, by the participation of her government and people in the war she was, and as a consequence of the impoverishment and destruction wrought by war within her limits, unable to continue to completion such works as would, if completed, have benefited West Virginia and her people, it is safe to say that the people

of that portion of the state did not contribute to that result (*Davis* v. *Gray*, 16 Wallace 203).

The answer denies that the purpose of the improvements or the effect of the improvements, in the main constructed within the present limits of Virginia, were with reference to the well-being, or would, if completed, have essentially affected the well-being of what is now West Virginia and her people. Answer under oath is not waived by the bill, and the answer is verified by the oath of the governor of West Virginia. No evidence has been offered upon the subject.

8. FACTS SHOWING INJUSTICE OF VIRGINIA'S CLAIMS.

The injustice of charging to West Virginia a proportion of the internal improvement debt of Virginia, prior to January 1, 1861, *as such*, is further intensified by the facts in relation to the population of the other during the years from 1823 to 1861. While the territory was separated, as we have said, from Eastern Virginia, and what is known as "The Valley" by the Alleghany Mountains, and while the markets of its people were to the westward, rather than to the eastward, it was no sparsely settled region.

There was laid before the constitutional convention of 1829-30 by Mr. Doddridge, one of its ablest members, who represented West Virginia, a statement showing the distribution of the white population in 1810, 1820 and 1829, as follows:

"In 1810 the white population was distributed thus, viz.:

East of the Blue Ridge		338,837
In the Valley	108,355	
West of the Alleghany	104,377	212,726
Whole population		551,553

"In 1820 population was distributed thus, viz.:

East of the Blue Ridge		248,875
In the Valley	121,196	
West of the Alleghany	133,112	254,308
Whole population		603,081

"And in 1829 the white population, as estimated by the auditor, stood thus:

East of the Blue Ridge		362,745
In the Valley	138,134	
West of the Alleghany	181,384	319.516
Whole population		682,261"

It will be noticed that from 1810 to 1820 the population east of the Blue Ridge increased 10,038. The Valley increased 12,841. The increase west of the Alleghany was 28,735. From 1820 to 1829 the increase in the white population east of the Blue Ridge was 13,870. The increase in the Valley was 16,938. The increase in the Trans-Alleghany territory was 48,272.

(These figures from the book entitled "Proceeding and Debates of the Virginia State Convention of 1829-30," page 686. There are some errors in addition; but they are, relatively, trifling. The book was printed after the convention had been dissolved, and, undoubtedly, the figures used by Mr. Doddridge, were correct.)

It will be observed that the increase in population in the territory "east of the Blue Ridge" combined with the increase in population "in the Valley" was 30,808, a total increase for the two regions of 17,464 less than the total increase in population in the territory "west of the Alleghany."

Mr. Doddridge said (page 682):

> "It thus appears that in 19 years, white population east of the Blue Ridge, beginning with 338.837, has increased to 362,745, or to the amount of 29,908. The increase in the Valley having in 1810, 108,345 has been 29,779. Making in 1829, 138.134. These data show that the increase in the valley and in the whole east are nearly equal. That in the Valley being the smallest only by a difference of 129. As the Valley has kept pace with the whole east for nineteen years past, so it probably will hereafter, and therefore, a permanent apportionment which would do justice to the present Valley and eastern population with reference to each other, might probably suit them in all future time: yet, the same apportionment might operate to the

utmost excess of cruelty and injustice to the Trans-Alleghany country. To concur in such a one would be a treachery to the Valley, of which we have not the least apprehension. The extent of this injustice will be manifest by comparing the increase of that population during the same period of 19 years. In 1810 we commenced with a population of 104,377, which, in 1829, is 181,384, having increased 77,007, or four times as much as either the Valley or all the country east of the Blue Ridge mountains."

The Territory of West Virginia was, by location, climate, proximity to Pennsylvania, Ohio and Kentucky, and in the sentiment of her people upon the question of slavery and the trifling number of slaves within her territory, inviting an immigration, which never sought, in even measurably the same numbers, the real slave states of the union. Notwithstanding this population, constantly increasing, of the $33,000,000 expended out of borrowed money, less than one-tenth was expended within what now are the limits of West Virginia; and it may very well be said that it was largely due to the fact of disproportionable representation.

It is truthfully said in "Part II." of this brief, page 173:

> "It should be remembered that there was not in the entire territory of Virginia, which is now West Virginia, on the 1st day of January, 1861, a single mile of state built or state-aided railroad, nor a mile of canal, nor a state building; not even a school, not a public institution of any kind."

9. UNDER THE ORDINANCE AND HER CONSTITUTION WEST VIRGINIA CANNOT BE CHARGED WITH INTEREST UNTIL AFTER THE ASCERTAINMENT IN THE MANNER PRESCRIBED OF HER EQUITABLE PROPORTION OF THE OLD VIRGINIA DEBT.

The ordinance prescribes a method of accounting by which a definite sum shall be ascertained. This sum the ordinance, in effect, declares to be West Virginia's just proportion of the old Virginia debt. Section 8 of Article VIII. of West Virginia's Constitution, when read in connection with the ordinance, as this Court has said it should be, produces precisely the same result. West Virginia did not agree to

pay interest on the sum to be ascertained by the prescribed method before this sum was ascertained.

We refer again to section 8 of Article VIII. of the Constitution of West Virginia.

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the 1st of January, 1861, shall be assumed by this state, and the legislature shall *ascertain the same* as soon as may be practicable and provide for the liquidation *thereof* by a sinking fund sufficient to pay the *accruing* interest and redeem the *principal* within thirty-four years."

That the word "thereof" refers to the result of an accounting in accordance with the terms of the ordinance, or, if the latter be eliminated, in accordance with such method as the legislature shall adopt, is not susceptible of doubt. That the command to the legislature to "provide for the liquidation thereof," means the sum which the legislature shall ascertain by pursuit of the methods prescribed by the ordinance, or if that be eliminated, by such method as the legislature shall adopt, is equally clear. The words "accruing interest" obviously refer to the word "principal."

We maintain most earnestly that, all things considered, it is clear that it was the manifest purpose that West Virginia was not to assume any portion of the public debt of Virginia as such, but was only to contribute to that end such sum, be it much or little, as would result from the accounting prescribed by the ordinance, unless the general words in the first clause of section 9 of the ordinance control and destroy the special provisions which follow, all being expressed in a single sentence. Moreover, this produces an equitable result, for the debt being an internal improvement debt, and nine-tenths of it having been expended by Virginia within her present limits, in public improvements, it would have been, in the highest degree, inequitable for the new state to take upon herself an obligation to contribute one-third of that debt, when Virginia retained the bank and other stocks.

"Accruing" is a word operative in the future, and has no reference to the past. When we speak of past due interest we refer to it as "accrued interest."

Six months' interest, the record shows, was due and defaulted on

this debt on January 1, 1861. Where is there any indication here, upon the part of West Virginia, of an intention to pay accrued interest? The interest up to the time of the ascertainment would be "accrued." She did not in her constitution assume:

> "a just proportion of the debt, with interest to accrue thereon, to the date of the ascertainment, until the just proportion shall have been ascertained and paid."

The constitution speaks of "accruing interest" and that means the interest to accrue on the principal thereafter to be ascertained, and not yet ascertained. This is not technical. It is substantial. It is in harmony with the ordinary use of the word "accrue" and with its technical, legal signification.

At an earlier hearing in this case, we called the attention of the Court to the case of *Gross* v. *Partenheimer*, 159 Pa. 556. The case may be briefly stated:

Plaintiff agreed to purchase from defendant, in April, 1883, a lot of land, for $8,000, payable $5,000 in cash, on delivery of deed, and the residue by plaintiff's assumption of a mortgage for $3,000, then on the lot, plaintiff to pay also the accruing interest on said mortgage, not exceeding six months. The six months' interest from the date of mortgage to February 26, 1893, was past due and unpaid, and, to avoid foreclosure proceedings, plaintiff was compelled to pay the same: He then brought suit to recover the sum thus paid, the vendor claiming that the purchaser was obliged to pay it under the agreement.

The court, at page 558, said:

> "This contention hinges entirely on the proper construction of the clause in the contract of sale above referred to, wherein the plaintiff agrees to pay 'the accruing interest in said mortgage not exceeding six months.' There is nothing in the affidavit of defense that can in any wise aid or control the construction of this clause. If, 'accruing interest' means interest which, according to the terms of the security, was due and payable on February 26, 1893, and remained overdue and unpaid at the date of the contract, the defendant's construction should prevail; but we cannot agree that these words mean any such thing. Such a con-

> struction would be strained and wholly unwarranted by the language employed. As generally undertsood. accruing' interest means running or accumulating interest, as distinguished from accrued or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it accruing interest. When we refer to interest heretofore payable but still remaining unpaid, we speak of it as overdue interest, arrears of interest, or interest in arrear, just as we speak of rent in arrear. We are therefore of opinion that the words 'accruing interest' do not refer to, or in any manner embrace any part of the six months' interest which was then overdue and unpaid. That interest was an encumbrance on the lot, which the defendant was bound to remove. He refused to do so, and the plaintiff, who was compelled to pay it, in order to prevent foreclosure of the mortgage, etc., is entitled to recover the amount thus paid with interest from date of payment. The learned court was clearly right in adjudging the affidavit of defence insufficient and entering judgment against defendant for the amount claimed by plaintiff."

If there had been any intent to assume, or pay, the accrued interest on the bonds of Virginia, outstanding, the constitution would have so expressed it; and, as expressed, we earnestly contend that it can be construed to mean no such thing.

For the convenience of the Court, we venture to insert the memorandum of authorities submitted by the late John G. Carlisle, who died during the last summer, upon this question of the liability of the state to pay interest.

10. MEMORANDUM OF JOHN G. CARLISLE.

> "It will be observed that in Paragraph II. of this draft of a decree the Master is not only directed to ascertain the amount and proportion of said indebtedness, but 'of the interest accrued thereon.'
>
> "Counsel for the defendant object further to this paragraph because there is no legal ground for directing the ascertainment of interest. The State of West Virginia has not obligated herself in any manner for the

payment of interest. The principle is well settled that a state is not liable to pay interest unless it has expressly contracted to do so.

"In support of this proposition this Court, in *United States* v. *North Carolina*, 136 U. S. 211, said:

"'A state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by lawful contract of its executive officers.'

"Following the principle thus announced by this Court, many of the state courts have laid down in distinct terms the same proposition. Among the decisions of those courts are the following:

Sawyer v. *Colgan*, 102 Cal. 293; 36 Pac 583.

Hawkins v. *Mitchell*, 34 Fla. 421, 422; 16 So. 316.

Melineaux v. *State*, 109 Cal. 380; Am. St. Rep. 50; 42 Pac. 34.

Flint, etc., R. R. v. *Board of State Auditors*, 102 Mich. 502; 60 N. W. 971.

Carr v. *State*, 127 Ind. 204; 22 Am. St. Rep. 624.

"In *Carr* v. *State*, 127 Ind. 204, 22 Am. St. Rep. 624, this principle is announced as one of the points decided:

"'A sovereign state is not bound to pay interest unless it has contracted to do so.'"

"The court, in the course of its opinion in this case, says:

"'In the case of *State ex rel.* v. *Board*, etc., 36 Ohio St. 409, it was held that in the absence of a promise to pay interest none can be recovered against a state, and that a state is not within the provisions of a general statute providing for the payment of interest in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute unless it is expressly named, and in support of its conclusion cited these cases: *Trustee, etc* v. *Campbell*, 16 Ohio St. 11; *Jaselyn* v. *Stone*, 28 Miss. 753; *State* v. *Kinne*, 41 N. J. 238; *Attorney General* v. *Cape Fear, etc., Co.*, 2 Ired. Eq. 444; *Auditorial Board* v. *Arles*, 15 Tex. 72; *State* v. *Thompson*, 10 Ark. 61. In *Wightman* v. *United States*, 23 Ct. of Cl. 144, the general rule

was stated, and it was said: 'Hence there is no law fixing a rate for interest for all classes of the public debt, and a long-established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment.' It was held in the case of *Tillson* v. *United States*, 100 U. S. 43, that a statute referring to a claim did not authorize a recovery of interest, in the absence of words expressly providing for the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is, there is no right to coerce the payment of a debt due from a sovereign, and, of course, a sovereign may impose limitations upon its liability."

In a note appended to this case as reported in 22 American State Reports, at page 448, we find the following:

'With respect to the obligation of the state to pay interest upon its indebtedness, the principal case is well established by other authorities upon the same subject. In nearly and perhaps all of the states there are statutory provisions providing that moneys, after they become due, shall, in the absence of express contract to the contrary, bear the rate of interest specified in such statutes; but, acting under the old common-law rule that the king or sovereign is not bound by statute unless expressly named therein, it has been uniformly held that these statutory provisions respecting interest did not apply to any obligation either of the state or of the national government, and therefore that interest is never allowed upon such obligations, in the absence of some special statute clearly manifesting the intention of the sovereign to be bound for the payment of interest upon the particular obligation or class of obligations under consideration (*United States* v. *North Carolina*, 136 U. S. 211; *State* v. *Thompson*, 10 Ark. 61; *State* v. *Board of Public Works*, 36 Ohio St. 409; *State* v. *Bank of Washington*, 18 Ark. 554; *United States* v. *Sherman*, 98 U. S. 565; *United States* v. *Bayard*, 127 U. S. 251; *Tillson* v. *United States*, 100 U. S. 43; *In re Gosman*, 17 Ch. Div. 771; *Attorney General* v. *Cape Fear N. Co.*, 2 Ired Eq., 444; *Bledsoe* v. *State*, 64 N. C. 392; *Trustee* v. *Campbell*, 16 Ohio St. 11; *Joselyn*

v. *Stone*, 28 Miss. 753; *Wightman* v. *United States*, 23 Ct. of Cls. 144)."

11. VIRGINIA'S RESPONSIBILITY FOR THE DELAY IN APPORTIONING THE DEBT.

Reading section 8 of Article VIII. of the Constitution of West Virginia with the ordinance, or regardless of it, the complainant, by her own act, rendered impossible, any ascertainment prior to January 1, 1871, of the just proportion of the public debt of Virginia to be borne by West Virginia. In 1866, she instituted in this Court, the suit of *Virginia* v. *West Virginia*, 11 Wallace 39. This was an original bill to settle the boundary line between the States of Virginia and West Virginia. It involved the question whether the counties of Berkeley and Jefferson were a part of West Virginia. The case was not decided until December, 1870. While Virginia cannot be complained of for instituting and prosecuting the suit, it is manifest that, until the determination thereof, there could be no apportionment of the old Virginia debt, either under the ordinance or under section 8 of Article VIII. of the Constitution of West Virginia.

Pending the decision of the case, the accounting provided for by the ordinance would be impossible, in view of its requirements:

> (*a*) "*Charging to it all state expenditures within the limits thereof.*"

Manifestly, so long as those limits were unsettled, this could not be done.

> (*b*) "*A just proportion of the ordinary expenses of the state government since any part of said debt was contracted.*"

This could not be fulfilled upon the basis of taxable values, area or population until the boundaries of the state were settled.

> (*c*) "*Deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period.*"

This could not be done until the territorial limits of the new state

were settled, and it was known what counties were included within the new state. So that, while entirely within her right, Virginia's own act compelled a delay from the filing of this bill until the entry of the final decree therein of an adjustment under the ordinance or under the constitution.

Section 9 of Article X. of the Constitution of Virginia, which became operative in 1870, contained the following provisions:

> "The general assembly shall provide by law for adjusting with the State of Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia, and shall provide that such sum as shall be received from West Virginia, shall be applied to the payment of the public debt of the state."

We do not deem it necessary here to give a history of the appointment of commissioners by the two states with reference to the adjustment of the debt. This history is set out in the pleadings. It is enough to say that as early as 1870, a commission appointed by West Virginia proceeded to Richmond, where the archives all were, and their visit resulted in accomplishing little. But, on March 30, 1871, the legislature of Virginia, by a law passed in 1871, apportioned the debt between the two states, assuming for itself two-thirds, and issuing certificates for the other one-third as West Virginia's share. Subsequent legislation of Virginia proceeded upon that apportionment, certificates being issued, to be accounted for by West Virginia.

It is difficult to conceive of any theory upon which Virginia could justly assume the function of apportioning the debt and issuing obligations for which West Virginia could be accountable. Virginia's general assembly were, by the constitutional provision above quoted, required to provide by law for adjusting with the State of West Virginia the proportion of the public debt to be borne by the two states. They proceeded to apportion it themselves, without consulting West Virginia.

West Virginia then was a comparatively new state, and her resources were relatively undeveloped.

To issue securities to be accounted for by West Virginia, was not only apparently in defiance of Virginia's own constitutional provision,

but was usurpatory, detrimental to the credit of West Virginia, and well calculated to produce resentment among her people.

From that time, West Virginia was placed in a position which rendered it almost impossible for her, with dignity and self respect, to take further initiative in the matter.

In 1894, the legislature of Virginia, after she had funded and refunded her debt, adopted a joint resolution, providing for the appointment of a

> "commission of seven members, who were authorized and directed to negotiate with the State of West Virginia for a settlement and adjustment of the latter state's part of the public debt proper to be borne by her."

It was provided:

> "But said commission shall, in no event, enter into any negotiation hereunder, except upon the basis that Virginia is bound only for the two-thirds of the debt of the original state which she has already provided for as her equitable proportion thereof."

It is quite manifest that West Virginia was here called upon, as a condition of any negotiation whatever, to accept the action of Virginia taken in 1871, 1879 and 1894 apportioning the debt, two-thirds to herself and one-third to West Virginia. It needs no argument to show that West Virginia could not be expected to negotiate upon such a basis. It was not until 1905, preliminary to the institution of this suit, that a commission went to West Virginia freed from such restraint.

The attention of the Court is especially directed to the Appendices "A," "B," "C," and "D" printed herewith.

We respectfully submit that from the record in this cause and upon the authorities cited by counsel for the defendant, the State of West Virginia ought to prevail.

WILLIAM G. CONLEY.
Attorney General of West Virginia.

JOHN C. SPOONER,
CHARLES E. HOGG,
W. MOLLOHAN,
GEORGE W. MCCLINTIC,
W. G. MATHEWS,
WM M. O. DAWSON,
Of Counsel for Defendant.

APPENDICES
A, B, C AND D.

APPENDIX A.

PLAINTIFF'S EXHIBIT "D-1."

Commonwealth of Virginia v. *State of West Virginia.*

Ordinary Expenses of Government.

ARTICLE [PARAGRAPH] IV.

Statement Prepared by
PRICE, WATERHOUSE & COMPANY,
Chartered Accountants.

Division of Ordinary Expenses of Government as per Article IV.:—		$40,023,287.79
I. On basis of Total Population (including Slaves) June 20, 1863:		
Virginia	75.66%	$30,281.619.54
West Virginia	24.34%	9,741,668.25
Note: This is without regard to color,— Whites and Blacks being taken together in arriving at the population of June 20, 1863, from the census figures of 1860 and 1870.		
II. On basis of Population (without Slaves) Estimated June 20, 1863:		
Virginia	66.71%	$26,699,535.28
West Virginia	33.29%	13,323,752.51

Ordinary Expenses of Government—Article IV.

	Schedule.	
General Expenses of Government, as per Commonwealth Disbursements	1	$20,371,768.47
Administrative Expenses of the Board of Public Works	2	221,532.78
Maps, Expenses of Surveys and Inspection of Internal Improvements	3	155,643.39
General Expenses of the Literary Fund	4	891,435.66
Interest on old Military Debt		24,265.31
Interest on Treasury Notes		157,879.02
Specie Premium		11,534.63
Interest on Sundry Claims		52,324.09
Interest on Temporary Loans		112,545.82
Interest on Public Debt	9	18,024,358.62
		$40,023,287.79

SCHEDULE I.

Analysis of General Expenses of Government—Summary.

Description.	*Amount.*
General Assembly	$ 4,130,064.55
Officers of Government	3,595,102.14
General Government	8,495.63
Pensions	88,548.74
Criminal Charges	1,785,6[illegible]2.11
Commissioners of the Revenue	1,697,751.95
Court Charges	1,188,212.34
Contingent Fund	679,120.46
Militia	755,663.41
Expenses of Representation	24,120.17
Public Arsenals	96,709.63
Public Guard (City)	839,528.23
Penitentiary, House Expenses	215,985.76

SCHEDULE 1—*Continued.*

Description.	*Amount.*
Penitentiary, Criminal Charges	256,522.93
Penitentiary, Officers	305,367.24
Warrants on Account, and General Appropriation	746,087.72
Slaves Transported and Executed	611,351.23
Gun Carriages	14,317.05
Guards in the Country	105,049.34
Public Improvements	11,803.75
Military Contingent	75,395.41
Lunatic Asylums	1,888,992.06
Revisions of Laws	4,500.00
Seines	71.10
Public Warehouses	35,722.00
Tobacco Sales	454.91
Armory, Manufactory and Repairs of Arms	243,015.60
Sale of Slaves	99.26
Expense of Lunatics	158,112.71
Collection and Transportation of Arms	10,212.83
Revolutionary Claims Agent	3,861.67
Administrators of J. Merryweather and R. Graves	11,067.33
Electors	11,839.26
Civil Prosecutions	47,684.56
Repairs to Governor's House	50,733.60
Penitentiary, Enlarging and Repairs	53,572.60
Clerk Hire, etc., on account of Delinquent Lands	18,374.27
Repairs to Capitol	51,281.47
Public Library	695.23
Military Equipment	9,993.09
Buckingham Furnace Lands	771.72
Transportation of Free Persons of Color to Liberia	26,103.50
Geological Survey	40,980.61
Military School, Appropriation and Repairs	296,296.19
Reassessment of Lands	147,868.10
Deaf, Dumb and Blind Institution	369,919.73

SCHEDULE 1—*Continued.*

Description.	*Amount.*
Unexpended Postage returned to Treasury	53.13
Penitentiary—*Hatcher* v. *Commonwealth*	12,897.96
Ferriage of Troops during late War	54.71
Criminal and Civil Code	52,073.88
Rents	52.25
Virginia Volunteers	29,470.05
Tobacco Sales and Burnt Tobacco	1,931.30
Land Taxes	296.59
Assessment of Free Negroes	897.21
Expenses of Sinking Fund	3,904.82
Fugitive Slave Fund	5,201.00
Land Sold in 1855	8.40
Public Printing	23,092.31
Claims under 27th and 45th ch. of Code of Virginia	1,344.05
Weights and Measures	14,854.90
Registration Expenses	14,661.20
Treasury Note Expenses	375.74
Tax on Dividends	128.50
Arms and Munitions of War	4,111.13
Survey of Washington's Birthplace	139.21
Temporary Clerks in Auditor's Office	3,826.64
Marking Virginia and Maryland Boundary	6,094.44
Maps	11,400.90
Public Arms	11,499.97
State Convention	258,677.40
Repairs to Legislative Halls	4,650.07
Medical College	25,000.00
Experimental Railroad	10,000.00
Blair & Bolling Special Service	200.00
Total	$21,209,952.03
Less—Total Credits as per Summary Schedule after P. No. 1	838,183.56
Total as per Recapitulation	$20,371,768.47

SCHEDULE "S."

Analysis of "Sundry Receipts."

Credits to Ordinary Expenses of Government—Auditor of Public Accounts—Summary.

Description.	*Total Amounts.*
Refunds of Advances, and amounts paid in error	$ 36,252.56
Rents	53,160.55
Repayments of Loans and Interest	1,603.35
Sundry Sales	15,631.70
Judgment on Bonds	16,483.69
Sale of Slaves	272,347.57
Sale of Land	9,189.61
Returns—Expenses of Lunatics	3,588.65
Returns—Lunatic Hospital	16,670.48
Returns—Court Charges	1,656.68
Governor's House	1,701.17
Refunds—Criminal Charges	3,754.69
Tax on Salaries	449.16
Refunds—Attorney General's Fees	1,622.74
Records of Court of Appeals and Clerk's Fees	42,154.55
Interest on Loans	3,914.53
Weighmaster of Live Stock	8,493.32
Virginia Volunteers	8,126.43
Tax on Express Companies	252.68
Collections from Banks to pay salary of Treasurer's Clerks	4,500.00
Voluntary Enslavements	5,175.54
Fugitive Slave Fund	2,444.50
Miscellaneous	53,078.06
	$562,242.26
Proceeds of Goods Manufactured at Penitentiary	275,941.30
Total Credits	$838,183.56

SCHEDULE 2.

Board of Public Works Disbursements—Administrative Expenses—Summary.

Description.	*Amount.*
Salary of Engineers	$ 54,353.30
Pay and Mileage—Members of the Board	19,286.71
Literary Fund, Difference in Exchange, etc.	187.50
Maps, Books, Supplies, Stationery, Postage, etc.	9,599.51
Salary of Secretary	4,982.97
Printing	14,098.70
Advertising	1,013.41
Doorkeeper's and Messengers' Compensation, Postage, etc.	4,208.34
Premium in favor of Specie over Bank Notes	45.60
Equivalent for Specie in Paying Auditor's Warrants	24.31
Literary Fund Transfer	48.67
Tax on Salaries—2nd Auditor's Office	143.76
Compensation	84.17
Engineers' Supplies and Repairs	2,200.63
Fee Bills	1,186.29
Expenses of Tour of Examination	488.37
Traveling Expenses—Respecting Loans, etc.	2,304.53
Expenses preparing Coupon Bonds	13,346.78
Damage Account—Experimental Railroad	65.00
Expenses *re* B. & O. Railroad	249.40
Expenses *re* Investigation Selden, Withers & Company	9,351.45
J. T. Soutar—New York Bond Agent	3,686.60
Commissioners, etc., for paying Coupons	4,604.87
Tabulated Railroad Reports, etc.	1,074.50
Sextant	40.00
Express	18.00
Collectors' Salaries	6,720.68
Salary of Second Auditor and Clerks	68,119.83
	$221,532.78

SCHEDULE 3.

Board of Public Works Disbursements.

Analysis of Charges to Both States to be Charged, in the Final Settlement, to Ordinary Expenses of Government.

MAPS.

Year.	*Reference.*	*Amount.*
1820	5-20	$12,000.00
1	1	9,000.00
2	1	9,000.00
5	22	4,428.79
1836	25	55.00
8	35	700.00
1848	22	750.00
9	21	750.00
1851	24	995.62
2	11-21-22	2,730.46
4	149	292.61
5	7	803.00
6	7	899.50
8	8	125.00
		$42,529.98

SURVEYS—SALARIES AND EXPENSES.

Year.	*Reference.*	*Amount.*
1820	6-7-8-10	$5,373.81
1	11	1,000.00
2	8	1,000.00
3	12	1,889.50
4	12-13	500.46
5	9-10	4,270.38
6	8	2,766.66
7	8	2,319.35
8	7	1,682.22

SCHEDULE 3—*Continued.*

Year.	*Reference.*	*Amount.*
9	8	2,100.00
1830	5	3,941.00
1	6-7	4,449.99
2	13	280.00
4	Pt. 16	2,151.32
5	Pt. 14-15	7,122.13
7	Pt. 22-23	12,464.35
8	20-26	16,699.84
9	13-16	13,678.93
1840	30-32	10,787.00
1	2-3	5,530.00
2	2	3,400.00
3	3	1,233.33
7	18	500.00
		$114,273.35
Credits as per Schedule attached		3,903.88
		$110,369.47

INSPECTION OF INTERNAL IMPROVEMENTS OF STATE.

Year.	*Reference.*	*Amount.*
1849	15	$ 665.00
1850	12	1,087.22
1	15	1,027.13
2	8	656.37
		$3,435.72
Credits as per Schedule attached		691.78
		$2,743.94

SUMMARY.

Maps	$ 42,529.98
Surveys, Salaries and Expenses	110,369.47
Inspection of Internal Improvements	2,743.94
	$155,643.39

SCHEDULE 4.

Summary of Analysis—Literary Fund Disbursements—General Expenses and Sundries.

Description.	*Amount.*
Copies of Judgments	$ 433.75
Clerks' Salaries	82,259.73
Expenses and Commissions to H. Eustace, etc., account of Bristoe Estate	1,786.30
Advances Account of Contingent Expenses	350.00
Judgments and Commissions on Escheats, Delinquent and Redeemed Lands	26,029.48
Accrued Interest and Premium on Sundry Securities Purchased	1,667.95
Expenses account of Purchase of Stock by J. Bauer	902.23
Commission on U. S. Debt	4.199.92
Cost of Seal	100.00
Stationery, Postage, Printing, Fee Bills and Advertising	8,625.21
Commission on Bonds	94.29
Sale of Slaves and Expenses of Free Negroes	837.73
Expenses on Sale of Stock	14.00
Taxes on Salaries	217.23
State Claims against the United States	2,722.82
Davis' Book on Criminal Law	12,000.00
Medical College	5,000.00
University of Virginia	649,874.00
Virginia Military Institute	28,500.00

SCHEDULE 4—*Continued.*

Description.	*Amount.*
Deaf, Dumb and Blind Institute	10,821.02
Hampden-Sidney College	25,000.00
Total	$891,435.66

SCHEDULE 9.

Interest on Public Debt.

Interest on Public Debt paid by the Board of Public Works	$5,825,538.66	
do do do	1,834,276.61	
Interest on Bank Debt paid by the Treasurer of the Commonwealth	360,883.02	
Interest on Public Debt (C. and O. Canal Loan) paid by Treasurer of Commonwealth	207,479.25	
Interest on Public Debt paid by the Sinking Fund from its establishment in 1853 till December 31st, 1860	11,762,509.04	
Interest on James River and Kanawha Guaranteed Bonds, paid by Treasurer of the Commonwealth	613,542.66	
		$20,606,229.24
Deduct		
Interest received on State Stock held by Board of Public Works and paid to that Board	$312,214.22	
Refund of Interest on Public Debt previously paid Selden, Wethers & Co.	29,924.70	

SCHEDULE 9—*Continued.*

Interest received by Sinking Fund of Trustees of Selden, Wethers & Company and J. T. Soutters ----	40,133.59	
Interest received on State Stock held by Board of Public Works, paid to that Board, etc., ----------	639,670.71	
Deduct		
Interest received by the Commonwealth on Certificate of State Stock, $100,000, owned by the Commonwealth ----------	30,213.70	
Interest received on State Stock held by the Literary Fund ----------	1,324,051.72	
Interest received on Bonds of J. R. & K. Company paid to the Treasurer of Commonwealth by that Company ----------	142,181.74	
Interest received by Sinking Fund on Stock held by them as Investments ----------	61,807.55	
Refunds received by the Sinking Fund account of over-payments ------	1,672.69	
		$ 2,581,870.62
		$18,024,353.62

Interest on 7% War Debt of 1813-14, viz: $319,000.00 and Interest on 6% War Debt of 1809, viz: 24,039.17, both of which were held throughout the period by the Literary Fund, has been excluded in both the Payments and Receipt statement above.

APPENDIX B.

CHAP. 75.—An Act to convert the Branch of the Northwestern Bank of Virginia at Jeffersonville into a Separate and Independent Bank.

Passed March 13, 1862.

Whereas the armed occupation of northwestern Virginia, by lawless enemies of this state, has entirely destroyed all business intercourse and relations between the Northwestern Bank of Virginia at Wheeling and its branch at Jeffersonville, to the great detriment of the state and loyal stockholders, and it seems proper under the circumstances to dissolve the connection heretofore subsisting between said bank and its branch at Jeffersonville, and of authorizing the latter to transact business as a separate and independent corporation:

1. Be it therefore enacted by the general assembly, that the branch of the Northern Bank of Virginia at Jeffersonville be and the same is hereby constituted, created and incorporated a separate, distinct and independent bank, under the corporate name of Graziers Bank of Virginia; and all the power, control, direction, supervision, relation and connection of said Northwestern Bank of Virginia over and with the said branch at Jeffersonville, are hereby dissolved, abrogated and annulled.

2. All the assets held by said branch (embracing all bills and notes discounted, whether the same be in suit, protested, due or maturing, all judgments, balances due on accounts current, all money, either in coin or currency, all evidences of debt or other securities, all real estate, and every right and interest) are absolutely vested in the said Graziers Bank of Virginia; and in every case where suit has been instituted in the name of the Northwestern Bank of Virginia for the recovery of money or other thing, to which said branch is entitled, the suit so brought shall be prosecuted in the name of the Northwestern Bank of Virginia, for the use and benefit of said Graziers Bank

of Virginia; and in every case where suit shall hereafter be instituted for the recovery of money or other thing belonging to said branch, the suit shall be in the name of said Graziers Bank of Virginia.

3. The said Graziers Bank of Virginia is subject to all the liabilities of the said branch, except so far as the said liabilities are modified by the followng sections of this act.

4. The said Graziers Bank of Virginia shall in no event be required to account to the said Northwestern Bank of Virginia for any portion of the net profits or contingent fund of the said branch, nor to contribute to the payment of, or pay out of the assets of said branch, or otherwise, to any stockholder, billholder or creditor of the said Northwestern Bank, any sum of money which any such stockholder, billholder or creditor may be entitled to demand and have of said Northwestern Bank of Virginia.

5. At any time within three months from the passage of this act, any loyal holder of stock in the Northwestern Bank of Virginia, whose stock in said bank was purchased through the said branch, or whose dividends have usually heretofore been credited to him at said branch, may return and assign to said Graziers Bank of Virginia such stock, and demand and receive in lieu thereof a certificate for a like number of shares of stock in the said Graziers Bank of Virginia.

6. As soon as may be after the expiration of the said three months from the passage of this act, the governor of the state shall cause certificates of the stock held by the state in the said Northwestern Bank of Virginia, for an amount equal to the balance of the capital stock of said branch, not exchanged under the previous section, to be in like manner returned and assigned to said Graziers Bank of Virginia, for a like number of shares of the stock thereof.

7. The Graziers Bank of Virginia, hereby established, shall be required to redeem, from loyal citizens of the Confederate States of America, in notes of its own issue, all such notes of said branch as may be in their possession at the passage of this act; provided the same be presented in six months after notice of this provision shall have been published for one month in some weekly newspaper published in the city of Richmond: and provided further, the amount

offered for redemption shall not exceed one hundred and eighty thousand dollars.

8. The legislature reserves the power to provide, after the termination of the war with the United States, the extent, mode and time of redemption by said Graziers Bank of Virginia, of any outstanding notes of said branch, with which, according to the principles of equity, justice and right, it is chargeable. But as it is represented to this general assembly that the said branch has a special deposit of twenty-four thousand dollars in gold with the said Northwestern Bank of Virginia, heretofore made by said branch to meet the redemption of its notes; and as notes payable at said branch may have been issued by the said Northwestern Bank of Virginia, which have not been reported to said branch, nor charged to said Northwestern Bank of Virginia, and which it would be evidently unjust to require the said branch to redeem, it is hereby expressly provided and enacted, that the whole amount of circulation of the said branch, which the said Graziers Bank of Virginia shall be required to redeem, under the provisions of this act, and of any subsequent act of the legislature, taken collectively, shall not exceed the balance of the circulation of said branch, after deducting therefrom the sum of twenty-four thousand dollars on account of said special deposit, and also any amount or amounts of circulation payable at said branch (if any such there be), issued by the said Northwestern Bank of Virginia, of which the said branch has not heretofore received notice from said Northwestern Bank of Virginia.

9. The cashier shall forthwith, after the expiration of three months from the passage of this act, out of the surplus or contingent fund of the said branch, pass to the credit of the stockholders of the said Graziers Bank of Virginia and to the state, a dividend of ten per centum upon their stock issued under the provisions of the fifth and sixth sections of this act.

10. The said Graziers Bank of Virginia shall be located and transact its business at the town of Jeffersonville.

11. The said Graziers Bank of Virginia may, by sales of new stock, increase its capital to two hundred thousand dollars.

12. The present board of directors for the said branch shall con-

tinue to act as a board of directors for the said Graziers Bank of Virginia until a new board shall be appointed under the general law.

13. Except so far as the same may be inconsistent with the provisions of this act, the general banking law of the state shall apply to the said Graziers Bank of Virginia; and the general law of joint stock companies shall apply to the said Graziers Bank of Virginia, so far as the same is applicable to it, and not inconsistent with the provisions of this act.

14. This act shall be in force from its passage, but may be repealed, altered or modified, at the pleasure of the general assembly.

(Copied from Acts of the General Assembly of Virginia, session of 1861-2, pp. 90, 91, 92, 93.)

Report of Honorable Chester D. Hubbard.

Wheeling, West Virginia, Feb. 23, 1871.

Hon. W. E. Stevenson, President.

Dear Sir: In accordance with the instructions of the Board of the School Fund in their action of the 15th, I have ascertained and herewith transmit a statement of the stock held by the state in the National Bank of West Virginia at Wheeling, the First National Bank of Wellsburg, and the Parkersburg National Bank, and the different funds to which said stock is credited.

I also proceeded to Wellsburg and exchanged as directed the stock of the Internal Improvement Fund in the First National Bank of Wellsburg, 163 shares, for United States 5-20 coupon bonds (the Bank had no registered bonds), receiving therefor six teen bonds of $1,000 each and three bonds of $100 each lettered and numbered as follows: $1000 K 134,401, 134,403, 134,404, 134,405, 134,406, 134,407, 134,413, 134,414, 163, 792, G. 142,990, 142,991, 142,981, 142,982, 142,983, 142,984, 142,985. $100 each I, 177,876, C. 102,938, D. 236,517. These bonds carry the coupons of July 1, 1871, and were issued July 1, 1867, under the act of 1865.

I have sealed the bonds in an envelope writing my name across the seal and labelling them as belonging to the School Fund of West Virginia, and have deposited them as a special deposit in the First

National Bank of Wheeling. The bonds can be exchanged for registered bonds by sending them to Washington. I will attend to it if you desire it to make any other disposition of the bonds you may direct.

The Bank declined to exchange for the stock held in the name of the state, believing that they could not safely do so under section 7, article 8, of the Constitution, besides I was not certain that my authority extended to such an exchange. If I am to make any other disposition of the bonds, please advise me at your earliest convenience.

The stock exchanged at Wellsburg will modify the bond statement to that extent.

Very respectfully,

C. D. HUBBARD.

Statement of Stock held by the State of West Virginia in "The National Bank of West Virginia at Wheeling," "The First National Bank of Wellsburg," and "The Parkersburg National Bank," and the different funds to which said stock is credited.

1837—(July 18)—The Commonwealth of Virginia subscribed 4,000 shares of stock in the Northwestern Bank of Virginia			$400,000.00
1857—March 3.—The Bank purchased of this stock 1,082 shares as follows:			
Northwestern Bank of Virginia at Wheeling,	332	shares	
" " " Wellsburg,	250	"	
" " " Parkersburg	250	"	
" " " Jeffersonville	250	"	
	1,082	"	
			108,200,00
Leaving 2,918 shares			$291,800.00
1865—March 2.—The Bank charged to the Commonwealth of Virginia all the stocks of the Bank of Jeffersonville, on the plea that the State had taken possession of that Bank, 1,642 shares			164.200.00

And transferred the remaining stock to the State of West Virginia, 1,276 shares	127,600.00
1866—July 1.—On the organization of the present Bank this 1,276 shares was transferred at 50 cents on the dollar, as follows, viz:	
National Bank of West Virginia at Wheeling, 300 shares	30,000.00
First National Bank of Wellsburg, 188 shares	18,800.00
Parkersburg National Bank, 150 shares	15,000.00
The Internal Improvement Fund of Virginia subscribed to the Stock of the Northwestern Bank of Virginia:	
1856—August 30.—326 shares	32,600.00
This stock was transferred at 50 cents on the dollar, 1866, July 1, to the First National Bank of Wellsburg, (163 shares)	16,300.00
The President and Directors of the Literary Fund of Virginia subscribed to the stock of the Northwestern Bank of Virginia—1832—November 24.—500 shares	50,000.00
This stock was transferred at 50 cents on the dollar, 1866, July 1, to the Parkersburg National Bank, 250 shares	25,000.00

SUMMARY.

The State now holds in the—	
National Bank of West Virginia at Wheeling, 300 shares (in name of the State)	$30,000.00
First National Bank of Wellsburg, 188 shares in name of the State	18,800.00
First National Bank of Wellsburg, 163 shares in Internal Improvement Fund	16,300.00
Parkersburg National Bank, 150 shares in Internal Improvement Fund	15,000.00
Parkersburg National Bank, 250 shares in Literary Fund	25,000.00
	$105,100.00

1867—July 9.—The Northwestern Bank of Virginia paid a dividend of 5 per cent on 326 shares Internal Improvement Fund	$1,630.00	
On 1,276 shares Commonwealth of Virginia stock	6,380.00	
On 500 shares Literary Fund	2,500.00	$10,510.00
1868—August 1.—A like dividend of 5 per cent on the same stocks		$10,510.00

February 21, 1871.

I, J. S. Darst, Auditor of the State of West Virginia, and *ex officio* Secretary of the Board of the School Fund of said State, hereby certify that the foregoing is a true and correct copy from the record of the minutes of the proceedings of said Board, pages 37 to 41 of Record Book No. 1 of said Board.

Given under my hand and official seal, this 26th day of February, 1910.

J. S. DARST,
Auditor.

APPENDIX C.

37TH CONGRESS, 2d Session. | SENATE. | MIS. DOC. No. 99.

MEMORIAL OF THE COMMISSIONERS

APPOINTED BY THE

CONVENTION OF WEST VIRGINIA

PRAYING

For the admission of that State into the Union.

MAY 31, 1862.—Referred to the Committee on Territories, and ordered to be printed.

To the Hon. B. F. WADE,

Chairman of the Committee on Territories:

In conformity with the suggestion of your committee, the undersigned, commissioners appointed by the convention to frame a constitution for West Virginia, beg leave to submit the following:

In the month of January, 1861, the Legislature of Virginia, convened in extra session, passed an act providing for the election of delegates on the 4th of February, 1861, to meet in convention at the city of Richmond on the 13th of the same month to take into consideration the then condition of the country.

The act calling the convention provided that it should submit any proposition it might adopt changing the relations of the State to the Federal Government or the organic law of the State to the voters of the State, to be approved or rejected by them at the polls, provided the people should so require by their vote on the 4th day of February, 1861; and accordingly the people, at the same time they voted for delegates to the convention, voted upon the question whether the action of the convention should be submitted to them

for their ratification before the said action of the convention should be of binding obligation.

The people, by a majority of more than fifty thousand votes, declared in favor of submitting the action of the convention to them for ratification or rejection.

On the 17th day of April, 1861, the convention passed an ordinance of secession; on the 24th day of April, 1861, commissioners appointed by the convention entered into an agreement with A. H. Stephens, vice-president of the so-called Confederate States, transferring the State to the said confederacy. On the fourth Thursday in May thereafter the question of ratifying or rejecting the ordinance of secession was submitted to the voters of the State, but prior to that day the authors of secession had organized the military forces of the State in the interest of the so-called Confederate States, and occupied most of the counties of the State on the day of voting upon the ordinance, so that, in fact, a reign of terror was inaugurated to prevent a free and fair expression of the popular will at the polls.

On the 22d of April, 1861, a meeting of the people of Harrison County was held at the courthouse of that county, which adopted the resolutions following:

GRAND UNION MEETING.

1,000 to 1,200 people present.

At a large and enthusiastic meeting of from 1.000 to 1,200 of the citizens of Harrison County, assembled at the courthouse upon a notice of forty-eight hours, on Monday, April 22, 1861, the following preamble and resolutions were adopted without one dissenting voice:

PREAMBLE.

Whereas the convention now in session in this State, called by the legislature, the members of which had been elected twenty months before said call, at a time when no such action as the assemblage of a convention by legislative enactment was contemplated by the people, or expected by the members they elected in May, 1859, at which time no one anticipated the troubles recently brought upon our common country by the extraordinary action of the State authorities of

South Carolina, Georgia, Alabama, Mississippi, Florida, Louisiana, and Texas, has, contrary to the expectation of a large majority of the people of this State, adopted an ordinance withdrawing Virginia from the Federal Union; and whereas by the law calling said convention it is expressly declared that no such ordinance shall have force or effect or be of binding obligation upon the people of this State until the same shall be ratified by the voters at the polls; and whereas we have seen with regret that demonstrations of hostility, unauthorized by law, and inconsistent with the duty of law-abiding citizens still owing allegiance to the Federal Government, have been made by a portion of the people of this State against the said government; and whereas the governor of this Commonwealth has, by proclamation, undertaken to decide for the people of Virginia that which they had reserved to themselves, the right to decide by their votes at the polls, and has called upon the volunteer soldiery of this State to report to him and hold themselves in readiness to make war upon the Federal Government, which Government is Virginia's government, and must, in law and of right, continue so to be until the people of Virginia shall by their votes and through the ballot box, that great conservator of a free people's liberties, decide otherwise; and whereas the peculiar situation of northwestern Virginia, separated as it is by natural barriers from the rest of the State, precludes all hope of timely succor in the hour of danger from other portions of the State, and demands that we should look to and provide for our own safety in the fearful emergency in which we now find ourselves placed by the action of our State authorities, who have disregarded the great fundamental principle upon which our beautiful system of government is based to wit, "that all governmental power is derived from the consent of the governed," and have, without consulting the people, placed this State in hostility to the federal government by seizing upon its ships and obstructing the channel at the mouth of Elizabeth River, by wresting from the federal officers at Norfolk and Richmond the customhouses, by tearing from the nation's property the nation's flag, and putting in its place a bunting, the emblem of rebellion, and by marching upon the national armory at Harper's Ferry—thus inaugurating a war without consulting those in whose

name they profess to act; and whereas the exposed condition of northwestern Virginia requires that her people should be united in action and unanimous in purpose—there being a perfect identity of interests in times of war as well as in peace: Therefore, be it

Resolved, That it be, and is hereby, recommended to the people in each and all of the counties composing northwestern Virginia to appoint delegates, not less than five in number, of their wisest, best, and discreetest men, to meet in convention at Wheeling, on the 13th day of May next, to consult and determine upon such action as the people of northwestern Virginia should take in the present fearful emergency.

Resolved, That Hon. John S. Carlile, W. P. Goff, Hon. Charles S. Lewis, John J. Davis, Thos. L. Moore, S. S. Fleming, Lot Bowen, Dr. Wm. Dunkin, Wm. E. Lyon, Felix Sturm, and James Lynch, be, and are hereby, appointed delegates to represent this county in said convention.

JOHN HURSEY, *President.*

J. W. HARRIS, *Secretary.*

Strange to say, among that large assembly not a single response was heard to the call by the president for the nays on any of the questions before the meeting.—[*Guard Office, Clarksburg, Va.*]

The proceedings of this meeting were sent to the several counties of northwestern Virginia by special messengers, which responded to the call, and, in accordance with it, a convention of some five hundred delegates from thirty-odd counties of the State met in the city of Wheeling on the 13th day of May, 1861, and adopted the following resolutions:

Convention of the people of northwestern Virginia, held at Wheeling, May 13, 1861.

The following resolutions were unanimously adopted:

1. *Resolved*, That in our deliberate judgment the ordinance passed by the convention of Virginia on the 17th day of April, 1861, known as the ordinance of secession, by which said convention undertook, in the name of the State of Virginia, to repeal the ratification of the Constitution of the United States by this State, and to resume all the

rights and powers granted under said Constitution, is unconstitutional, null and void.

2. *Resolved,* That the schedule attached to the ordinance of secession, suspending and prohibiting the election of members of Congress for this State, is a manifest usurpation of power to which we ought not to submit.

3. *Resolved,* That the agreement of the 24th of April, 1861, between the commissioners of the Confederate States and this State, and the ordinance of the 25th of April, 1861, approving and ratifying said agreement, by which the whole military force and military operations, offensive and defensive, of this Commonwealth, are placed under the chief control and direction of the President of the Confederate States, upon the same principles, basis, and footing, as if the Commonwealth were now a member of said confederacy, and all the acts of the executive officers of our State in pursuance of said agreement and ordinance, are plain and palpable violations of the Constitution of the United States, and are utterly subversive of the rights and liberties of the people of Virginia.

4. *Resolved,* That we earnestly urge and entreat the citizens of the State everywhere, but more especially in the western section, to be prompt at the polls on the 23d instant, and to impress upon every voter the duty of voting in condemnation of the ordinance of secession, in the hope that we may not be involved in the ruin to be occasioned by its adoption, and with the view to demonstrate the position of the west on the question of secession.

5. *Resolved,* That we earnestly recommend the citizens of Western Virginia to vote for members of the Congress of the United States in their several districts, in the exercise of the rights secured to us by the Constitutions of the United States and the State of Virginia.

6. *Resolved,* That we also recommend to the citizens of the several counties to vote at said election for such persons as entertain the opinions expressed in the foregoing resolutions for members of the senate and house of delegates of our State.

7. *Resolved,* That in view of the geographical, social, commercial, and industrial interests of northwestern Virginia, this convention are constrained, in giving expression to the opinion of their constituents,

to declare that the Virginia convention, in assuming to change the relation of the State of Virginia to the federal government, have not only acted unwisely and unconstitutionally, but have adopted a policy utterly ruinous to all the material interests of our section, severing all our social ties, and drying up all the channels of our trade and prosperity.

8. *Resolved,* That in the event of the ordinance of secession being ratified by a vote, we recommend to the people of the counties here represented, and all others disposed to cooperate with us, to appoint on the 4th day of June, 1861, delegates to a general convention, to meet on the 11th of that month, at such place as may be designated by the committee hereinafter provided, to devise such measures and take such action as the safety and welfare of the people they represent may demand—each county to appoint a number of representatives to said convention equal to double the number to which it will be entitled in the next house of delegates; and the senators and delegates to be elected on the 23d instant, by the counties referred to, to the next general assembly of Virginia, and who concur in the views of this convention, to be entitled to seats in the said convention as members thereof.

9. *Resolved,* That inasmuch as it is a conceded political axiom that government is founded on the consent of the governed and is instituted for their good, and it cannot be denied that the course pursued by the ruling power in the State is utterly subversive and destructive of our interests, we believe we may rightfully and successfully appeal to the proper authorities of Virginia to permit us peacefully and lawfully to separate from the residue of the State, and form ourselves into a government to give effect to the wishes, views, and interests of our constituents.

10. *Resolved,* That the public authorities be assured that the people of the northwest will exert their utmost power to preserve the peace, which they feel satisfied they can do, until an opportunity is afforded to see if our present difficulties cannot receive a peaceful solution; and we express the earnest hope that no troops of the Confederate States be introduced among us, as we believe it would be eminently calculated to produce civil war.

11. *Resolved*, That in the language of Washington, in his letter of the 17th of September, 1787, to the President of Congress: "In all our deliberations on this subject we have kept steadily in view that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, and perhaps our national existence." And therefore we will maintain and defend the Constitution of the United States and the laws made in pursuance thereof, and all officers acting thereunder in the lawful discharge of their respective duties.

12. *Resolved*, That John S. Carlile, James S. Wheat, C. D. Hubbard, F. H. Peirpoint, Campbell Tarr, G. R. Latham, Andrew Wilson, S. H. Woodward, and James W. Paxton be a central committee to attend to all the matters connected with the objects of this convention; and that they have power to assemble this convention at any time they may think necessary.

13. *Resolved*, That each county represented in this convention, and any others that may be disposed to co-operate with us, be requested to appoint a committee of five, whose duty it shall be to correspond with the central committee, and to see that all things necessary be done to carry out the objects of this convention.

14. *Resolved*, That the central committee be instructed to prepare an address to the people of Virginia, in conformity with the foregoing resolutions, and cause the same to be published and circulated as extensively as possible.

By order of the convention.

JOHN W. MOSS, *President.*

G. L. CRANMER,
M. M. DENT,
C. B. WAGGENER,
Secretaries.

Under the eighth of which resolutions delegates to a convention were chosen on the 4th of June, 1861, and met in the city of Wheeling on the 11th of that month, and adopted the following declaration on the 13th, two days after they met.

A declaration of the people of Virginia, represented in convention, at the city of Wheeling, Thursday, June 13, 1861.

The true purpose of all government is to promote the welfare and provide for the protection and security of the governed; and when any form or organization of government proves inadequate for, or subversive of this purpose, it is the right, it is the duty of the latter, to alter or abolish it. The bill of rights of Virginia, framed in 1776, reaffirmed in 1830, and again in 1851, expressly reserves this right to a majority of her people. The act of the general assembly, calling the convention which assembled at Richmond in February last, without the previously expressed consent of such majority, was therefore a usurpation; and the convention thus called has not only abused the powers nominally intrusted to it, but with the connivance and active aid of the executive, has usurped and exercised other powers, to the manifest injury of the people, which, if permitted, will inevitably subject them to a military despotism.

The convention, by its pretended ordinances, has required the people of Virginia to separate from and wage war against the government of the United States, and against the citizens of neighboring States, with whom they have heretofore maintained friendly, social, and business relations.

It has attempted to subvert the Union founded by Washington and his co-patriots in the former days of the republic, which has conferred unexampled prosperity upon every class of citizens, and upon every section of the country.

It has attempted to transfer the allegiance of the people to an illegal confederacy of rebellious States, and required their submission to its pretended edicts and decrees.

It has attempted to place the whole military force and military operations of the Commonwealth under the control and direction of such confederacy, for offensive as well as defensive purposes.

It has, in conjunction with the State executive, instituted, wherever their usurped power extends, a reign of terror, intended to suppress the free expression of the will of the people, making elections a mockery and a fraud.

The same combination, even before the passage of the pretended ordinance of secession, instituted war by the seizure and appropriation of the property of the Federal Government, and by organizing and mobilizing armies, with the avowed purpose of capturing or destroying the capital of the Union.

They have attempted to bring the allegience of the people of the United States into direct conflict with their subordinate allegiance to the State, thereby making obedience to their pretended ordinances treason against the former.

"We, therefore, the delegates here assembled in convention to devise such measures and take such action as the safety and welfare of the loyal citizens of Virginia may demand, having maturely considered the premises, and viewing with great concern the deplorable condition to which this once happy Commonwealth must be reduced unless some regular adequate remedy is speedily adopted, and appealing to the Supreme Ruler of the universe for the rectitude of our intentions, do hereby, in the name and on behalf of the good people of Virginia, solemnly declare that the preservation of their dearest rights and liberties, and their security in person and property, imperatively demand the reorganization of the government of the Commonwealth, and that all acts of said convention and executive, tending to separate this Commonwealth from the United States, or to levy and carry on war against them, are without authority and void; and that the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated."

This convention continued in session several weeks, and on the 19th of June, the following ordinance was adopted:

An ordinance for the reorganization of the State government, passed June 19, 1861.

The people of the State of Virginia, by their delegates assembled in convention at Wheeling, do ordain as follows:

1. A governor, lieutenant governor, and attorney general for the State of Virginia shall be appointed by this convention to discharge offices by the existing laws of the State, and to continue in office for

six months, or until their successors be elected and qualified; and the general assembly is required to provide by law for an election of governor and lieutenant governor by the people as soon as in their judgment such an election can be properly held.

2. A council, to consist of five members, shall be appointed by this convention to consult with and advise the governor respecting such matters pertaining to his official duties as he shall submit for consideration, and to aid in the execution of his official orders. Their term of office shall expire at the same time as that of the governor.

3. The delegates elected to the general assembly on the 23d day of May last, and the senators entitled under existing laws to seats in the next general assembly together with such delegates and senators as may be duly elected under the ordinances of this convention, or existing laws, to fill vacancies, who shall qualify themselves by taking the oath or affirmation hereinafter set forth, shall constitute the legislature of the State, to discharge the duties and exercise the powers pertaining to the general assembly. They shall hold their offices from the passage of this ordinance until the end of the terms for which they were respectively elected. They shall assemble in the city of Wheeling on the 1st day of July next, and proceed to organize themselves as prescribed by existing laws in their respective branches. A majority in each branch of the members qualified as aforesaid shall constitute a quorum to do business. A majority of the members in each branch thus qualified, voting affirmatively, shall be competent to pass any act specified in the twenty-fourth section of the fourth article of the constitution of the State.

4. The governor, lieutenant governor, attorney general, members of the legislature, and all officers now in the service of the State, or of any county, city or town thereof, or hereafter to be elected or appointed for such service, including the judges and clerks of the several courts, sheriffs, commissioners of the revenue, justices of the peace, officers of the city and municipal corporations, and officers of militia, and officers and privates of volunteer companies of the State, not mustered into the service of the United States, shall each take the following oath or affirmation before proceeding in the discharge of their several duties:

"I solemnly swear (or affirm) that I will support the Constitution of the United States, and the laws made in pursuance thereof, as the supreme law of the land, anything in the constitution and laws of the State of Virginia, or in the ordinances of the convention which assembled at Richmond on the 13th of February, 1861, to the contrary notwithstanding; and that I will uphold and defend the government of Virginia as vindicated and restored by the convention which assembled at Wheeling on the 11th of June, 1861."

If any elective officer, who is required by the preceding section to take such oath or affirmation, fail or refuse so to do, it shall be the duty of the governor, upon satisfactory evidence of the fact, to issue his writ declaring the office to be vacant, and providing for a special election to fill such vacancy, at some convenient and early day, to be designated in said writ; of which due publication shall be made for the information of the persons entitled to vote at such elections; and such writ may be directed, at the discretion of the governor, to the sheriff or sheriffs of the proper county or counties, or to a special commissioner or commissioners to be named by the governor for the purpose. If the officer who fails or refuses to take such oath or affirmation be appointed by the governor, he shall fill the vacancy without writ; but if such officer be appointed otherwise than by the governor or by election, the writ shall be issued by the governor, directed to the appointing power, requiring it to fill the vacancy.

ARTHUR J. BOREMAN,
President.

G. L. CRANMER, *Secretary.*

This convention, in pursuance of the declaration and ordinance aforesaid, elected a governor, lieutenant governor, and attorney general; each to serve for six months, and until their successors could be elected by the people of the State (which election was had on the 23d day of May, 1862). The governor, by proclamation, convened the legislature, under and by virtue of the power vested in him by the constitution of the State so to do, to meet in the city of Wheeling on the ——— day of July, 1861, and addressed an official letter to the President of the United States, calling upon him, as the

Chief Executive of the United States, to aid him, as the executive of the State, in suppressing the insurrection in the State, and to protect the people of the State from domestic violence. To this letter the President of the United States responded, recognizing the governor, thus elected by the June convention, as the chief magistrate of the Commonwealth of Virginia.

On the 9th day of July, 1861, the legislature elected senators of the United States, who were admitted on the 13th day of July to seats in the United States Senate, as senators from the State of Virginia.

On the 20th of August, 1861, the convention at Wheeling passed the following ordinance:

An ordinance to provide for the formation of a new State out of a portion of the territory of this State.

Whereas it is represented to be the desire of the people inhabiting the counties hereinafter mentioned to be separated from this Commonwealth, and to be erected into a separate State and admitted into the Union of States and become a member of the Government of the United States:

The people of Virginia, by their delegates assembled in convention at Wheeling, do ordain that a new State, to be called the State of Kanawha, be formed and erected out of the territory included within the following described boundary: Beginning on the Tug Fork of Sandy River, on the Kentucky line, where the counties of Buchanan and Logan join the same, and running thence with the dividing lines of said counties and the dividing line of the counties of Wyoming and McDowell to the Mercer County line, and with the dividing line of the counties of Mercer and Wyoming to the Raleigh County line; thence with the dividing line of the counties of Raleigh and Mercer, Monroe and Raleigh, Greenbrier and Raleigh, Fayette and Greenbrier, Nicholas and Greenbrier, Webster, Greenbrier, and Pocahontas, Randolph and Pocahontas, Randolph and Pendleton to the southwest corner of Hardy County; thence with the dividing line of the counties of Hardy and Tucker to the Fairfax Stone; thence with the line dividing the States of Maryland and Virginia to the Pennsylvania line; thence with the line dividing the States of Pennsylvania

and Virginia to the Ohio River; thence down said river, and including the same, to the dividing line between Virginia and Kentucky, and with the said line to the beginning, including within the boundaries of the proposed new State the counties of Logan, Wyoming, Raleigh, Fayette, Nicholas, Webster, Randolph, Tucker, Preston, Monongalia, Marion, Taylor, Barbour, Upshur, Harrison, Lewis, Braxton, Clay, Kanawha, Boone, Wayne, Cabell, Putnam, Mason, Jackson, Roane, Calhoun, Wirt, Gilmer, Ritchie, Woods, Pleasants, Tyler, Doddridge, Wetzel, Marshall, Ohio, Brooke, and Hancock.

2. All persons qualified to vote within the boundaries aforesaid, and who shall present themselves at the several places of voting within their respective counties on the fourth Thursday in October next, shall be allowed to vote on the question of the formation of a new State, as hereinbefore proposed; and it shall be the duty of the commissioners conducting the election at the said several places of voting, at the same time, to cause polls to be taken for the election of delegates to a convention to form a constitution for the government of the proposed State.

3. The convention hereinbefore provided for may change the boundaries described in the first section of the ordinance, so as to include within the proposed State the counties of Greenbrier and Pocahontas, or either of them, and also the counties of Hampshire, Hardy, Morgan, Berkeley, and Jefferson, or either of them, and also such other counties as lie contiguous to the said boundaries or to the counties mentioned in this section, if the said counties to be added, or either of them, by a majority of the votes given, shall declare their wish to form part of the proposed State, and shall elect delegates to the said convention, at elections to be held at the time and in the manner herein provided for.

4. Poll books shall be prepared under the direction of the governor for each place of voting in the several counties hereinbefore mentioned, with two separate columns, one to be headed, "For the new State," the other "Against the new State." And it shall be the duty of the commissioners who superintend, and the officers who conducted the election in May last, or such other persons as the governor may appoint, to attend at their respective places of holding

elections, and superintend and conduct the election herein provided for. And if the said commissioners and officers shall fail to attend at any such place of holding elections, it shall be lawful for any two freeholders present to act as commissioners in superintending the said election, and to appoint officers to conduct the same. It shall be the duty of the persons superintending and conducting said election to employ clerks to record the votes, and to indorse on the respective poll books the expenses of the same.

If, on the day herein provided for holding said election, there shall be in any of the said counties any military force, or any hostile assemblage of persons, so as to interfere with a full and free expression of the will of the voters, they may assemble at any other place within their county, and hold an election as herein provided for. It shall be the duty of the commissioners superintending, and officers conducting said election, and the clerks employed to record the votes, each, before entering upon the duties of his office, to take, in addition to the oath now required by the general election law, the oath of office prescribed by this convention. It shall be the duty of the officers and commissioners aforesaid, as soon as may be, and not exceeding three days after said election, to aggregate each of the columns of said poll-books, and ascertain the number of votes recorded in each, and make a return thereof to the secretary of the Commonwealth, in the city of Wheeling, which return shall be in the following form, or to the following effect:

"We, ———, commissioners, and ———, conducting officer, do certify that we caused an election to be held at ———, in the county of ———, at which we permitted all persons to vote that were entitled to do so under existing laws, and that offered to vote, and that we have carefully added up each column of our poll-books, and find the following result:

"For a new State, ——, votes; against a new State, —— votes.

"Given under our hands this —— day of ——, 1861."

"Under which certificate there shall be added the following affidavit:

"——— county, to wit:

"I, ——, a justice of the peace, (or any officer now authorized by law to administer oaths), in and for said county, do certify that the above-named commissioners and conducting officer severally made oath before me that the certificate by them above signed is true.

"Given under my hand this —— day of ——, 1861."

The original poll-books shall be carefully kept by the conducting officers for ninety days after the day of the election, and upon the demand of the executive shall be delivered to such person as he may authorize to demand and receive them.

5. The commissioners conducting the said election in each of said counties shall ascertain, at the same time they ascertain the vote upon the formation of a new State, who has been elected from their county to the convention, hereinbefore provided for, and shall certify to the Secretary of the Commonwealth the name or names of the person or persons so elected to the said convention.

6. It shall be the duty of the governor, on or before the 15th day of November next, to ascertain and by proclamation make known the result of the said vote: and if a majority of the votes given within the boundaries mentioned in the first section of this ordinance shall be in favor of the formation of a new State, he shall so state in his said proclamation, and shall call upon said delegates to meet in the city of Wheeling on the 26th day of November next, and organize themselves into a convention: and the said convention shall submit, for ratification or rejection, the constitution that may be agreed upon by it to the qualified voters within the proposed State, to be voted upon by said voters on the fourth Thursday in December next.

7. The county of Ohio shall elect three delegates; the counties of Harrison, Kanawha, Marion, Marshall, Monongalia, Preston, and Wood shall each elect two; and the other counties named in the first section of this ordinance shall each elect one delegate to the said convention. And such other counties as are described in the third section of this ordinance shall, for every seven thousand of their population according to the census of 1860, be entitled to one delegate, and to an additional delegate for any fraction over thirty-five hundred: but each of said counties shall be entitled to at least one

delegate. The said delegate shall receive the same per diem as is now allowed to members of the general assembly; but no person shall receive pay as a member of the general assembly and of the convention at the same time.

8. It shall be the duty of the governor to lay before the general assembly, at its next meeting, for their consent, according to the Constitution of the United States, the result of the said vote, if it shall be found that a majority of the votes cast be in favor of a new State, and also in favor of the constitution proposed to said voters for their adoption.

9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of the said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.

The lands within the proposed State of non-resident proprietors shall not in any case be taxed higher than the lands of residents therein. No grant of lands or land warrants issued by the proposed State shall interfere with any warrant issued from the land office of Virginia prior to the 17th day of April last which shall be located on lands within the proposed State now liable thereto.

10. When the general assembly shall give its consent to the formation of such new State it shall forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the said new State may be admitted into the Union of States.

11. The government of the State of Virginia, as reorganized by this convention at its session in June last, shall retain, within the territory of the proposed State, undiminished and unimpaired, all the

powers and authority with which it has been vested, until the proposed State shall be admitted into the Union by the Congress of the United States; and nothing in this ordinance contained, or which shall be done in pursuance thereof, shall impair or affect the authority of the said reorganized State government in any county which shall not be included within the proposed State.

A. I. BOREMAN, *President.*

G. L. CRANMER, *Secretary.*

Under this ordinance the people within the boundary prescribed, having voted almost unanimously for a new State, and having elected delegates to a convention as provided for, those delegates thus elected from the counties named lying in the boundaries of the proposed new State met, and formed the constitution now before the committee, which was, on the 3d of April, 1862, ratified and adopted by the people of the counties named by the vote accompanying the constitution; and, as required by the ordinance, the legislature of the State of Virginia was convened by proclamation of the governor, and passed the act accompanying the constitution, giving the assent of the legislature of Virginia to the formation of the proposed State of West Virginia.

ELBERT H. CALDWELL.
JAMES W. PAXTON.
E. B. HALL.

APPENDIX D.

COMMONWEALTH OF VIRGINIA.

INVESTMENTS IN CAPITAL STOCK.

Investments in Companies Lying Wholly Within the Territory Now Constituting the Commonwealth of Virginia:		
Banks	$ 2,108,591.00	
Turnpike and Road Companies	1,897,747.22	
Bridge Companies	49,622.16	
Navigation Companies	908,173.17	
Railroad Companies	13,713,256.55	
Alexandria Canal Company	272,000.00	
Total Investment in Virginia Companies		$18,949,390.10
Percentage of Total Investment 62.9120		
Investments in Companies Lying Wholly Within the Territory Now Constituting the State of West Virginia:—		
Banks	$ 391,800.00	
Turnpike and Road Companies	700,103.49	
Bridge Companies	78,412.50	
Navigation Companies	210,500.00	
Total Investment in West Virginia Companies		$1,380,815.99

Brought forward		$20,330,206.09
Percentage of Total Investment -- 4.5844		
Investments in Inter-State Companies:—		
Turnpike and Road Companies	$ 175,108.58	
James River and Kanawha Company (3.49% located in West Virginia)	9,245,140.46	
Winchester and Potomac Railroad Company	120,000.00	
Total Investments in Inter-State Companies		9,540,249.04
Percentage of Total Investment 31.6736		
Chesapeake and Ohio Canal Company: Maryland Division		250,000.00
Percentage of Total Investment--0.8300		
Total Investment in Capital Stock		$30,120,455.13